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ONTARIO LABOUR RELATIONS BOARD REPORTS

April 1994



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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

Cited [1994] OLRB REP. APRIL

EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
Reports*, Butterworth & Co., Toronto.



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Remedies - Discharge - Discharge for Union Activity - Interim Relief - Trade Union - Trade Union Status - Employees discharged after signing letter setting out dissatisfaction with working conditions and asking employer to recognize them in representative capacity - Employees filing unfair labour practice complaint and seeking interim reinstatement - Employer asking Board to dismiss interim relief application and unfair labour practice complaint on ground that employees not engaged in trade union activity - Board satisfied that arguable case made out that employees attempting to establish association that might have acquired characteristics of "trade union" under the *Act* and that terminations motivated, at least in part, by their participation in effort to negotiate collectively with their employer - Balance of harm favouring granting relief - Interim reinstatement ordered

MINIWORLD MANAGEMENT, OPERATING AS NORTH YORK INFANT NURSERY AND PRESCHOOL; RE MADELENE ALAGANO, CATALINA ALVAREZ, ELIZABETH ARAUJO, ELEN BUCKLEY, SUZANNA CABRAL AND SUSAN CHISLETT

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Remedies - Discharge - Discharge for Union Activity - Interim Relief - Board reinstating discharged resident superintendents on interim basis pending disposition of unfair labour practice complaint - Board clarifying that interim reinstatement involving both previous benefits of employment (including residence) and obligations

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Remedies - Duty to Bargain in Good Faith - Interim Relief - Unfair Labour Practice - Union alleging violation of employer's duty to bargain in good faith in failing to disclose during bargaining *de facto* decision to close logging camp - Union seeking interim order that camp be re-opened -Interim order would require employer to return heavy equipment already moved out, and to reverse notification, bumping and re-assignment process that had already taken place - Union failing to act promptly in filing its application with Board - Balance of harm weighing in respondent's favour - Application dismissed

AVENOR INC.; IWA CANADA, LOCAL 2693

340

Representation Vote - Certification - Practice and Procedure - Union objecting to results of representation vote on grounds that certain individual ("A") ought not to have voted and that certain other individual ("B") was not on voters list, but ought to have been - Union and employer making full written representations in respect of objections - Union seeking oral hearing - Board satisfied that oral hearing unnecessary to determine objections raised by union - Board concluding that, having agreed to count A's ballot at the time of the vote, union ought not to be permitted to resile from its agreement and challenge A's status after ballots were counted - Board similarly concluding that having agreed to composition of voters' list, and having certified that all eligible voters had had opportunity to vote, union ought not to be permitted to assert that B was eligible voter - Board declining to order second representation vote - Certification application dismissed

HIGHLAND PACKERS LIMITED; UFCW, AFL, CIO, CLC

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Sale of a Business - Abandonment - Bargaining Rights - Crown Transfer - Ministry of Health revoking nursing home's licence, taking over nursing home and operating it for 3 years - Ministry of Health calling for and receiving proposals for licensed beds lost due to earlier revocation and awarding beds to a number of licensees, including "HG" - Board finding

that part of Crown undertaking had been transferred to “HG”, that there were valid bargaining rights to be transferred and that an intermingling of employees had occurred - Board finding that predecessor’s collective agreement would have applied at time “HG” started combined operation in 1991 without a vote had *Crown Transfer Act* been applied as it should have been - Evidence not supporting submission that union had abandoned its bargaining rights - Application under *Crown Transfer Act* allowed

HERITAGE GREEN SENIOR CENTRE, SAINT ELIZABETH HOME SOCIETY,
ONTARIO MINISTRY OF HEALTH AND; RE SEIU, LOCAL 532

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Security Guard - Bargaining Unit - Certification - Union applying to represent employees of security company - Union proposing that bargaining unit encompass all employees and employer proposing that unit be confined to security guards - Union asserting that unit should be limited to Regional Municipality of Sudbury and employer asserting that unit should encompass entire District of Sudbury - Board reviewing principles to be applied in determining bargaining unit appropriateness - Board observing that all employees share “community of interest” by virtue of working for same employer and that “real life collective bargaining” able to accommodate groups with very different duties and conditions - Union’s proposed bargaining unit found to be appropriate - Certificate issuing

BURNS INTERNATIONAL SECURITY SERVICES LIMITED; RE USWA; RE
GROUP OF EMPLOYEES

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Sale of a Business - Certification - Change in Working Conditions - Natural Justice - Practice and Procedure - Unfair Labour Practice - Union alleging that employer violating statutory freeze - Employer acknowledging its status as “successor employer” by virtue of section 64.2 of the *Act*, but arguing that Board ought to dismiss complaint due to union’s 3 1/2 month delay in bringing complaint - Employer also submitting that statutory freeze not applying to it because it never received notice of union’s certification application - Board declining to dismiss for delay and finding that statutory freeze applying to successor employer under section 64(3) of the *Act* - Employer’s preliminary motions dismissed

GROUP 4 C.P.S. LIMITED; RE USWA

400

Sale of a Business - Security Guards - Predecessor providing security services to condominium building - Successor characterizing its operations as reception functions - Successor seeking to distinguish between concierge and patrol services - Board finding services provided by successor to be security services, that those services related to servicing the premises under section 64.2 of the *Act*, and that services provided by successor substantially similar to those provided by predecessor

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Security Guards - Sale of a Business - Predecessor providing security services to condominium building - Successor characterizing its operations as reception functions - Successor seeking to distinguish between concierge and patrol services - Board finding services provided by successor to be security services, that those services related to servicing the premises under section 64.2 of the *Act*, and that services provided by successor substantially similar to those provided by predecessor

CANADIAN CORPS OF COMMISSIONAIRES (TORONTO AND REGION); RE
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Termination - Petition - Reconsideration - Board not accepting that petitions filed representing voluntary expression of wishes of employees - Termination application dismissed - Reconsideration application dismissed

MAPLE LODGE FARMS; RE MECHANICS IN GARAGE MAPLE LODGE FARM;
RE UFCW, LOCAL 175

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Trade Union - Discharge - Discharge for Union Activity - Interim Relief - Remedies - Trade Union Status - Employees discharged after signing letter setting out dissatisfaction with working conditions and asking employer to recognize them in representative capacity - Employees filing unfair labour practice complaint and seeking interim reinstatement - Employer asking Board to dismiss interim relief application and unfair labour practice complaint on ground that employees not engaged in trade union activity - Board satisfied that arguable case made out that employees attempting to establish association that might have acquired characteristics of "trade union" under the *Act* and that terminations motivated, at least in part, by their participation in effort to negotiate collectively with their employer - Balance of harm favouring granting relief - Interim reinstatement ordered

MINIWORLD MANAGEMENT, OPERATING AS NORTH YORK INFANT NURSERY AND PRESCHOOL; RE MADELENE ALAGANO, CATALINA ALVAREZ, ELIZABETH ARAUJO, ELEN BUCKLEY, SUZANNA CABRAL AND SUSAN CHISLETT

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Trade Union - Trade Union Status - Intervenor union submitting that applicant union should be denied "status" because of irregularities related to ratification of constitution and requisite quorum at organizational meeting - Board satisfied that actions taken at organizational meeting sufficient to create organization, admit members, and to approve constitution - Board paying particular attention to manifest intention of participants, which was to create trade union for purpose of certification application - Board finding applicant to be "trade union" within meaning of the *Act*

CATERAIR CHATEAU CANADA LIMITED; RE CANADIAN FOOD AND ALLIED WORKERS' UNION; RE HERE, LOCAL 75.....

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Trade Union Status - Discharge - Discharge for Union Activity - Interim Relief - Remedies - Trade Union - Employees discharged after signing letter setting out dissatisfaction with working conditions and asking employer to recognize them in representative capacity - Employees filing unfair labour practice complaint and seeking interim reinstatement - Employer asking Board to dismiss interim relief application and unfair labour practice complaint on ground that employees not engaged in trade union activity - Board satisfied that arguable case made out that employees attempting to establish association that might have acquired characteristics of "trade union" under the *Act* and that terminations motivated, at least in part, by their participation in effort to negotiate collectively with their employer - Balance of harm favouring granting relief - Interim reinstatement ordered

MINIWORLD MANAGEMENT, OPERATING AS NORTH YORK INFANT NURSERY AND PRESCHOOL; RE MADELENE ALAGANO, CATALINA ALVAREZ, ELIZABETH ARAUJO, ELEN BUCKLEY, SUZANNA CABRAL AND SUSAN CHISLETT

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CATERAIR CHATEAU CANADA LIMITED; RE CANADIAN FOOD AND ALLIED WORKERS' UNION; RE HERE, LOCAL 75.....

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Unfair Labour Practice - Certification - Change in Working Conditions - Natural Justice - Practice and Procedure - Sale of a Business - Union alleging that employer violating statutory freeze - Employer acknowledging its status as "successor employer" by virtue of section 64.2 of the *Act*, but arguing that Board ought to dismiss complaint due to union's 3 1/2 month delay

in bringing complaint - Employer also submitting that statutory freeze not applying to it because it never received notice of union's certification application - Board declining to dismiss for delay and finding that statutory freeze applying to successor employer under section 64(3) of the *Act* - Employer's preliminary motions dismissed

GROUP 4 C.P.S. LIMITED; RE USWA 400

Unfair Labour Practice - Crown Employees Collective Bargaining Act - Change in Working Conditions - Interim Relief - Remedies - Union alleging that employers violating statutory freeze by altering employees' pension plan and seeking interim relief pending disposition of complaint - Employers submitting that Board should not grant interim relief which is tantamount to final disposition of main complaint - Board not agreeing that interim relief never appropriate in such circumstances - Board satisfied that balance of harm favouring union and that interim relief should be granted - Board directing employers to provide bargaining unit employees with pension plan equivalent to Public Service Pension Plan pending disposition of unfair labour practice complaint

BEEF IMPROVEMENT ONTARIO INCORPORATED, THE CROWN IN RIGHT OF ONTARIO (AS REPRESENTED BY THE ONTARIO MINISTRY OF AGRICULTURE AND FOOD) AND ONTARIO SWINE IMPROVEMENT ONTARIO INCORPORATED AND; RE OPSEU; RE GROUP OF EMPLOYEES..... 341

Unfair Labour Practice - Duty to Bargain in Good Faith - Interim Relief - Remedies - Union alleging violation of employer's duty to bargain in good faith in failing to disclose during bargaining *de facto* decision to close logging camp - Union seeking interim order that camp be re-opened - Interim order would require employer to return heavy equipment already moved out, and to reverse notification, bumping and re-assignment process that had already taken place - Union failing to act promptly in filing its application with Board - Balance of harm weighing in respondent's favour - Application dismissed

AVENOR INC.; IWA CANADA, LOCAL 2693 340

4020-93-JD Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 269, Applicant v. Amherst Roofing and Sheetmetal Ltd., United Brotherhood of Carpenters' & Joiners of America, Local 93, Responding Parties

Construction Industry - Jurisdictional Dispute - Sheet metal workers' union and Carpenters' union disputing assignment of work in connection with removal, handling and installation of plywood and wood blocking for flashing as part of re-roofing contract at paper mill in Cornwall - Board confirming assignment of disputed work to Sheet metal workers' union

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *J. Raso*, *Leo LaVallee* and *Ross Mitchell* on behalf of the applicant; *J. James Nyman* and *Neil Melanson* on behalf of the United Brotherhood of Carpenters' & Joiners of America, Local 93; *Pamela Yudcovitch* and *Peter Harding* on behalf of Amherst Roofing and Sheetmetal Ltd.

DECISION OF THE BOARD; April 25, 1994.

1. This is an application concerning a jurisdictional dispute filed pursuant to section 93 of the *Labour Relations Act* by the Ontario Sheet Metal Workers' and Roofers' Conference and Sheet Metal Workers' International Association, Local 269. This application was filed on February 22, 1994.

2. The Board held a consultation on April 25, 1994 with respect to this application. The work in dispute consists of the removal, handling and installation of 1/2" plywood and wood blocking for flashing as part of a re-roofing contract at Domtar Paper Mill #3, Cornwall, Ontario. Amherst Roofing and Sheet Metal Ltd. ("Amherst") was awarded a contract for the removal of an existing roof and re-roofing from Ross & Anglin Limited. Amherst assigned the re-roofing work to members of the Sheet Metal Workers' International Association, Local 269 ("Sheet Metal Workers"). The United Brotherhood of Carpenters and Joiners of America, Local 93 ("Carpenters") claim that the work in dispute should have been assigned to its members. The Carpenters have a bargaining relationship with Ross & Anglin Limited and the Sheet Metal Workers do not. The Sheet Metal Workers have a bargaining relationship with Amherst but the Carpenters do not.

3. After reviewing the material and after considering the submissions made by counsel for the Carpenters and counsel for Amherst at the consultation, the Board advised the parties orally on April 25, 1994 that the assignment of the work in dispute to members of the Sheet Metal Workers' International Association, Local 269 was a proper assignment.

4504-93-M IWA Canada, Local 2693, Applicant v. Avenor Inc., Responding Party

Duty to Bargain in Good Faith - Interim Relief - Remedies - Unfair Labour Practice - Union alleging violation of employer's duty to bargain in good faith in failing to disclose during bargaining *de facto* decision to close logging camp - Union seeking interim order that camp be re-opened - Interim order would require employer to return heavy equipment already moved out, and to reverse notification, bumping and re-assignment process that had already taken place - Union failing to act promptly in filing its application with Board - Balance of harm weighing in respondent's favour - Application dismissed

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *G. O. Shamanski* and *P. V. Grasso*.

APPEARANCES: *Wilf McIntyre* for the applicant; *Fred Bickford* and *Douglas Burn* for the responding party.

DECISION OF THE BOARD; April 26, 1994

1. The name of the responding party in the title of proceedings is amended to read: "Avenor Inc."
2. This is an application for interim relief under section 92.1 of the *Labour Relations Act*. The application was filed in conjunction with an application under section 91 of the Act, alleging a breach of section 15.
3. The facts pleaded in both applications are essentially the same, as is the central request for relief: an order that the responding party "continue to operate Camp No. 134 and not phase it out as the Company has proposed". As the camp had already been closed by the time this case was heard, the applicant amended its request to an order that the camp be re-opened.
4. For the purposes of the present application, the respondent was prepared to concede that the facts pleaded made out an arguable case. The essence of that case is a failure on the part of the respondent to disclose during bargaining a *de facto* business decision that would have a significant impact on the bargaining unit i.e. the impending closure of a logging camp and the accompanying displacement of approximately 40 employees. It was the respondent's position, however, that the balance of harm clearly weighed in its favour and, therefore, that the application ought to be dismissed.
5. The Board agrees with the respondent. The harm alleged by the applicant is the potential lay-off of all of the employees working at the camp. To this, the applicant sought to add at the hearing the potential harm to its reputation in the eyes of its members if it were unable to prevent or remedy the respondent's breach.
6. One difficulty with the applicant's position, of course, is that the harm pleaded is primarily "financial" or personal in nature. As the Board has noted on prior occasions, this is the type of harm that can be adequately remedied if the union succeeds in the main application. Further, the harm raised in respect of the applicant's reputation was unsupported by any facts and may also be greatly alleviated by success in the main application.
7. Much more important, however, is the fact that the applicant failed to act promptly in filing its application with the Board. The camp closed on March 25, 1994. The applicant became

aware of the impending closure no later than March 8, 1994. Nevertheless, it waited until March 22, 1994 to serve its application on the employer and until March 31, 1994 to file it with the Board. As a result, the relief requested would now require the employer to *return* the heavy equipment that has already been moved out of the camp, reverse the notification, bumping and re-assignment process that has already taken place, and revive the costs that the closure was intended to reduce. In these circumstances, the Board is satisfied that the balance of harm has shifted strongly in the respondent's favour.

8. The application is dismissed.

4196-93-M Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario (as represented by the Ontario Ministry of Agriculture and Food) and Ontario Swine Improvement Ontario Incorporated and Beef Improvement Ontario Incorporated, Responding Parties v. Group of Employees

Crown Employees Collective Bargaining Act - Change in Working Conditions - Interim Relief - Remedies - Unfair Labour Practice - Union alleging that employers violating statutory freeze by altering employees' pension plan and seeking interim relief pending disposition of complaint - Employers submitting that Board should not grant interim relief which is tantamount to final disposition of main complaint - Board not agreeing that interim relief never appropriate in such circumstances - Board satisfied that balance of harm favouring union and that interim relief should be granted - Board directing employers to provide bargaining unit employees with pension plan equivalent to Public Service Pension Plan pending disposition of unfair labour practice complaint

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *W. H. Wightman* and *R. R. Montague*.

APPEARANCES: *David Wright* and *Bob Patrick* for the applicant; *Stephen Patterson* and *Rob Scouller* for Ontario Ministry of Agriculture and Food; *Patty Murray* for Ontario Swine Improvement Ontario Incorporated and Beef Improvement Ontario Incorporated; *Larry Ouimet* for Ontario Dairy Herd; *John Lawrence* for Beef Improvement Ontario; *J. Paul McGill* for a group of employees.

DECISION OF THE BOARD; April 28, 1994

1. This is an application for interim relief under section 92.1(1) of the *Labour Relations Act* which provides that:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

The application was heard on April 7, 1994.

2. This application was filed at the same time as the application, under section 91 of the Act, in Board File No. 4195-93-U (the "main application").

3. In the main application, the applicant trade union alleges that the responding parties have violated section 81(1) of the *Labour Relations Act* by altering the pension plan provided to certain employees represented by the applicant trade union. Commonly known as a statutory “freeze” provision, section 81(1) of the *Labour Relations Act* provides that:

81.-(1) Where notice has been given under section 14 or section 54 and no collective agreement is in operation, no employer shall, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty, of the employer, the trade union or the employees, and no trade union shall, except with the consent of the employer, alter any term or condition of employment or any right, privilege or duty of the employer, the trade union or the employees,

- (a) until the Minister has appointed a conciliation officer or a mediator under this Act, and,
 - (i) seven days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator, or
 - (ii) fourteen days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board,
- as the case may be; or
- (b) until the right of the trade union to represent the employees has been terminated.

whichever occurs first.

4. In the main application, the applicant seeks the following relief:

SCHEDULE A

1. A declaration that the Respondent Beef Improvement Ontario Incorporated has violated section 81(1) of the Act in failing to provide bargaining unit employees with a pension plan equivalent to the Public Service Pension Plan;
2. A declaration that the Respondent Ontario Swine Improvement Incorporated has violated section 81(1) of the Act in failing to provide bargaining unit employees with a pension plan equivalent to the Public Service Pension Plan;
3. An order that the Respondent Beef Improvement Ontario Incorporated immediately provide to its bargaining unit employees a pension plan equivalent to the Public Service Pension Plan;
4. An order that the Respondent Ontario Swine Improvement Incorporated immediately provide to its bargaining unit employees a pension plan equivalent to the Public Service Pension Plan;
5. An order that the Respondent Beef Improvement Ontario Incorporated fully compensate, with interest, its bargaining unit employees for any losses suffered by those employees from the date the Respondent assumed responsibility for the beef improvement program as a result of the failure of Beef Improvement Ontario Incorporated to provide a pension plane equivalent to the Public Service Pension Plan;
6. An order that the Respondent Ontario Swine Improvement Incorporated fully compensate, with interest, its bargaining unit employees for any losses suffered by those employees from the date the Respondent assumed responsibility for the swine improvement program as a result of the failure of Ontario Swine Improvement Incorporated to provide a pension plan equivalent to the Public Service Pension Plan;

7. Such other relief as the Applicant may request and the Board may allow.

5. In this proceeding, the applicant seeks the following interim orders:

SCHEDULE A

The Applicant requests that the Board make the following interim orders with respect to this Application:

1. An order that the Respondent Ontario Swine Improvement Incorporated provide to its bargaining unit employees a pension plan which is equivalent to the Public Service Pension plan effective from the date of this Application and continuing until the Board disposes of the Applicant's Application under section 91 of the Act alleging a violation by the Respondent of section 81(1) of the Act and until any remedy awarded by the Board pursuant to that Application is fully implemented;
2. An order that the Respondent Beef Improvement Ontario Incorporated provide to its bargaining unit employees a pension plan which is equivalent to the Public Service Pension Plan effective from the date that the beef improvement program is transferred to the Respondent by the Ministry of Agriculture and Food and continuing until the Board disposes of the Applicant's Application under section 91 of the Act alleging a violation by the Respondent of section 81(1) of the Act and until any remedy awarded by the Board pursuant to that Application is fully implemented.

The applicant submits that this interim relief should be granted to prevent harm to individual affected employees as follows:

...

The first type of harm which would result from the denial of this request for interim relief is that which flows from the employees' loss of the right to claim a disability pension in the event of becoming either physically or mentally incapable of performing their job duties under the pension plans offered by BIO and OSI. If a situation did arise whereby an OSI or BIO employee becomes incapacitated within the meaning of the Public Service Pension Plan while a decision from the Board was pending on the main application was pending, it is submitted that the harm that would result if no interim relief had been ordered would in fact be irreparable. As set out in the declaration of Heather Gavin, in such circumstances the affected employee would be unable to claim the benefit of a disability pension and would have to wait until s/he was entitled to a retirement pension in order to claim any pension benefits. While there can be no certainty that such a situation will arise, there can also be no certainty that it will not.

The applicant also asserts that it will suffer a collective bargaining harm if interim relief is not granted as follows:

The second type of harm which would result from not granting interim relief is the harm that would be caused by requiring the Applicant to choose between bargaining from a starting point of a lessor pension than the Public Service Pension Plan, or delaying collective bargaining until such time as the Board issues a decision on the main Application.

6. At the hearing, a group of employees sought to intervene in this proceeding. Their representative indicated that the employees wished to participate in the hearing in order to address the Board with respect to how they have been dealt with by the applicant and the bringing of this and the main application, and also with respect to the merits of the application. The applicant opposed this intervention.

7. Upon hearing the representations of the parties, the Board ruled, orally, that the group of employees did not have standing to participate in this proceeding. This is not a fair representation or other like proceeding, and the dealings between the employees and the applicant are not

relevant to it. Further, section 81(1) of the Act is a provision which relates to collective bargaining, the parties to which are the employers and the applicant trade union. As such, and as the words of section 81(1) themselves suggest, the only proper or necessary parties are the employers and the applicant. Accordingly, the Board dismissed the intervention of the group of employees.

8. In opposing the application for interim relief, the responding parties argued that it should be dismissed because:

- (a) the applicant had accepted the alteration of the pension plan and is therefor estopped from seeking the relief requested;
- (b) the applicant delayed in:
 - (i) filing this and the main application or in
 - (ii) pursuing this application;
- (c) there was no demonstrable danger of any potential significant harm;
- (d) further, or in the alternative to (c), the balance of harm weighs against granting interim relief.

9. (The Board notes that the applicant sought to introduce additional materials with respect to the estoppel argument. The responding parties objected. Upon hearing from the parties in that respect, the Board ruled that it would not admit additional materials. In this case, the applicant had had ample opportunity to file additional materials with the Board prior to the hearing but had not done so. Accordingly, the Board found it appropriate to deal with the application on the basis of the materials filed prior to the hearing, although the Board also noted that it appeared from the submissions of the parties that the documentary record with respect to the estoppel issue was incomplete).

10. The estoppel argument was not pursued with any real vigour. It is apparent that the estoppel materials before the Board are incomplete. Further, and in any event, what materials are before the Board in that respect do not provide a sufficient basis for the Board to find an estoppel. Indeed, counsel for the Crown conceded that the evidence in that respect is insufficient.

11. Nor is the Board persuaded that this application should be dismissed on the basis of delay. Certainly, applications for interim relief should generally be filed and pursued with dispatch and diligence. However, the Board's approach to "delay" in such matters cannot be a mechanical one. Consequently, what constitutes inordinate delay in one case will not necessarily constitute inordinate delay in another. In every case, the Board must consider the circumstances.

12. In this case, the parties disagreed on the length of the "delay". At most, the applicant delayed some two months in filing this and the main application. However, delay in a collective bargaining context is not generally measured from the first day an issue is raised between the parties. The nature of the collective bargaining process is such that it would be inappropriate and counter-productive to expect the parties to run to the Board immediately upon some issue arising during negotiations. On the contrary, it is appropriate to expect that parties will try to work out their collective bargaining differences between themselves before coming to the Board with an application alleging that there has been a breach of the section 81(1) statutory freeze. Accordingly, the delay in filing this case is at most a month, which in the circumstances is not excessive.

13. Further, this matter was first scheduled to be heard on March 11, 1994. That hearing was adjourned on consent, apparently because of some problems in the delivery of documents to

one or more of the responding parties and to enable the responding parties to file their responses. Although the applicant did not specifically request that the matter be rescheduled for hearing until March 24, 1994, it appears that it was under the impression that the matter was going to be rescheduled by the Board in due course without such a request. In any case, the Board is satisfied that any delay in proceeding with this matter which can be attributed to the applicant should not cause the Board to dismiss this application. (However, this situation should serve as a reminder to parties that they should always make clear the nature of and basis for any adjournment request or agreement so that such “misunderstandings” might be avoided. At the very least, parties should indicate to the Board when or in what manner they wish an adjourned proceeding to be rescheduled. We do not mean to suggest that the Board will necessarily be bound by any agreements between the parties in that respect, but the Board will certainly take the parties agreements or wishes into account.)

14. Turning to the “threshold” and “balance of harm” issues, the Board finds it appropriate to review the purpose and effect of section 81(1) of the Act.

15. Section 81 is a strict liability provision in that an employer or trade union need not be improperly motivated for its actions to be in breach of it (see *Beaver Electronics Ltd.*, [1974] OLRB Rep. March 120, *Kodak Canada Ltd.*, [1977] OLRB Rep. Aug. 517). Commonly referred to as a “freeze” provision, section 81(1) of the *Labour Relations Act* prohibits both an employer and the trade union which represents that employer’s employees from altering anything which affects the employment of those employees after an appropriate notice to bargain has been given, unless its collective bargaining partner consents. The purpose of these provisions is to provide a stable point of departure for collective bargaining, thereby facilitating the collective bargaining process, by maintaining the working conditions and circumstances in place when the freeze is triggered. This serves to provide a fixed, though not necessarily static, basis for collective bargaining and operates to preclude the unilateral alteration of any bargainable aspect of the employment status quo which might give one party an advantage in negotiations.

16. Although the “freeze” label has stuck, it may be somewhat of a misnomer. The words of section 81(1) of the Act might be read to mean that there can be no change in anything which affects employment during the specified period. However, the Board has interpreted this provision as operating to preserve the pattern of employment which exists when it comes into effect, rather than specific terms, conditions or other circumstances of employment. Consequently, both the employer and the trade union continue to be entitled to operate within the parameters of the established pattern of employment. (see, for example, *Simpsons Limited*, [1985] OLRB Rep. April 594, *Mohawk Hospital Services Inc.*, [1993] OLRB Rep. Sept. 873).

17. The Board has taken a flexible, and purposive labour relations approach to the statutory freeze under the *Labour Relations Act*. Further, and as the language of section 81(1) itself suggests, there is nothing wrong or even unusual with an employer and trade union negotiating with respect to matters which are subject to the statutory freeze.

18. It is common ground between the parties that the responding employers Ontario Swine Improvement Ontario Incorporated (“OSI”) and Beef Improvement Ontario Incorporated (“BIO”) are successor employers for labour relations purposes, that the applicant has given them written notice to bargain under section 54(1) of the *Labour Relations Act*, and that section 81(1) applies. OSI and BIO concede that the pension plan they have put in place for the employees represented by the applicant who are affected by this application is different from the pension plan in place prior to the transfer from the Crown to OSI and BIO respectively, and that the current plan is not equivalent to that previous plan. Consequently, there appears to have been a change in the

pension plan which constitutes an alteration of a condition of employment within the meaning of section 81(1) of the Act.

19. On the basis of the materials before the Board, and for purposes of this interim application, the Board is not satisfied that the applicant trade union has consented or agreed to this change in working conditions.

20. The Board is satisfied that the applicant has demonstrated an arguable case for the relief sought in the main application (*J.C.V.R. Packaging Inc.*, [1993] OLRB Rep. Nov. 1145, *Loeb Highland*, [1993] OLRB Rep. March 197). (The Board notes that none of the responding parties took issue with the applicability of this threshold test in this interim application).

21. It was also common ground between the parties that in determining whether this is an appropriate case for interim relief, the Board should balance the harm that would be suffered by the applicant if interim relief is not granted against the harm which would be suffered by the responding employers if interim relief is granted.

22. The Board agrees with the responding parties that the harm to individual employees asserted by the applicant is remote and highly speculative. There is no indication that any affected employee has been adversely affected in a manner which cannot be adequately addressed in the main application. The Board is satisfied that it is not appropriate to grant the interim relief sought on that basis.

23. The other harm asserted by the applicant is a collective bargaining harm. In the Board's view, it is not accurate to say that the applicant is seeking to gain an advantage in collective bargaining through this interim proceeding. On the contrary, the applicant seeks to have the collective bargaining positions of the parties restored to what they were at the time of the transfer from the Crown to OSI and BIO respectively. That is what section 81(1) is all about; namely, providing a period during which there is a fixed and stable point of departure for collective bargaining. The scheme of the *Labour Relations Act* recognizes that a change in the terms, conditions or other circumstances of employment by one party can cause harm to collective bargaining position of the other party to a collective bargaining relationship. This is a significant labour relations harm.

24. The responding parties OSI and BIO submitted that this sort of collective bargaining harm need not be addressed in an interim proceeding and that collective bargaining can proceed, on other issues, pending the disposition of the main application. The Board does not agree. It is true that collective bargaining can take many routes, and that some items can often be bargained before and sometimes without reference to others. However, in the big picture, the starting point for bargaining can have a significant impact on what is given or taken in one area which can in turn affect what is given or taken in other areas. The statutory freeze is just that and it addresses situations which readily lend themselves to interim relief.

25. OSI and BIO also submit that they both face undue financial hardship and suffer financial harm which "could not be undone, regardless of the outcome of the main application", if interim relief is granted.

26. That may well be. However, it was (and is) within the power of OSI and BIO to move the collective bargaining process along and end the statutory freeze of the pattern of employment. It does not appear that either has tried to do so. Further, OSI and BIO are the architects of the situation. They are the ones who decided to put into place a pension plan which they concede is not equivalent to the previous one, over what appears to the Board on the basis of the materials filed, to be the objections of the applicant. Further, there is nothing in the materials before the Board

which substantiates counsel's assertion of the extent of the financial harm which OSI and BIO are likely to suffer if interim relief is granted.

27. Finally, the responding party submitted that the Board should not grant interim relief which is tantamount to a final disposition of the main application. The Board has said that it is appropriate to proceed carefully in circumstances where interim relief may be tantamount to a disposition of the main application. However, the Board has not said, nor would it be correct to say, that interim relief is never appropriate in such circumstances. In any event, we do not agree that granting interim relief herein will amount to a final disposition of the main application. The responding parties may be able to establish an estoppel in the main application, or there may be other factors present in the main application (including the continued existence of this statutory freeze) which will lead to a different result and a vacating of an interim order.

28. In the result, the Board is satisfied that the balance of harm favours the applicant. The Board is further satisfied that interim relief should be granted.

29. The Board therefor orders that the responding parties Ontario Swine Improvement Ontario Incorporated and Beef Improvement Ontario Incorporated forthwith provide to bargaining unit employees represented by the applicant a pension plan equivalent to the Public Service Pension Plan, pending the disposition of the application in Board File No. 4195-93-U or other order of the Board.

3340-93-R United Steelworkers of America, Applicant v. Burns International Security Services Limited, Responding Party v. Group of Employees, Objectors

Bargaining Unit - Certification - Security Guard - Union applying to represent employees of security company - Union proposing that bargaining unit encompass all employees and employer proposing that unit be confined to security guards - Union asserting that unit should be limited to Regional Municipality of Sudbury and employer asserting that unit should encompass entire District of Sudbury - Board reviewing principles to be applied in determining bargaining unit appropriateness - Board observing that all employees share "community of interest" by virtue of working for same employer and that "real life collective bargaining" able to accommodate groups with very different duties and conditions - Union's proposed bargaining unit found to be appropriate - Certificate issuing

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *J. A. Ronson* and *K. Davies*.

APPEARANCES: *Robert Healey* and *Brando Paris* for the applicant; *Monique Smith* and *Murray J. Borowski* for the responding party; no one appearing on behalf of the objectors.

DECISION OF THE BOARD; April 7, 1994

1. This is an application for certification.
2. The parties are agreed that the application is timely.

3. The parties are further agreed (and the Board finds) that the applicant is a trade union within the meaning of the *Labour Relations Act*.

4. However, the parties are not agreed on the *description* of the unit of employees appropriate for collective bargaining.

5. The parties' disagreement crystallized during discussions with a Board Officer, who was attempting to resolve the dispute without a formal hearing. During the course of that discussion, the employer revised its proposed bargaining unit description after realizing that the local geographic boundaries were not what it believed them to be, but *before* there was any disclosure of the union's membership count. Accordingly, this is not a case like *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618 where the Board ruled that, in order to discourage "gerrymandering", it would refuse to permit an amendment to the bargaining unit description *after* the count was disclosed.

6. Initially, the parties were at odds about a number of aspects of the bargaining unit description. By the time the matter came on for hearing, however, there remained only two elements of disagreement:

- (a) whether the bargaining unit description should refer to "all employees" of the employer in a geographic area, or should be limited to "security guards" in that area, and
- (b) whether the geographic scope of the bargaining unit should refer to the *Regional Municipality* of Sudbury, or the *District* of Sudbury.

7. It will be convenient to deal with each of these issues, in turn.

8. The facts are not really in dispute.

II

9. The employer (as its name indicates) provides security services to a wide variety of customers across Ontario. In each case, the services are tailored to the needs of the particular customers. We were told that, to a large extent, the employees' terms and conditions of employment are determined by the terms of Burns' contract with its commercial clients.

10. The company hopes to attract clients in the Sudbury area (variously defined), as well as in Kirkland Lake and North Bay. At the present time, though, there is only one client in Kirkland Lake - a district hospital - and no clients in North Bay at all. We were told that the company has a call-in list for the north, but there is no indication of how often the company resorts to that list.

11. Employees across the north are paid in roughly the same fashion, and receive the same benefits - although, as noted, their particular wages, terms, and conditions of employment are largely linked to the particular service contracts which Burns has with its customers. Vacation scheduling has to be co-ordinated for all of these northern areas, where employees have a common call-in number. However, there is no evidence of any significant employee interchange from one customer/site to another; and, in particular, no regular interchange between the employee group working at the E.B. Eddy plant in "Nairn Centre", and employee groups working elsewhere.

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12. In order to understand the parties "geographic" dispute, it is necessary to say something about the municipal boundary lines in the Sudbury area.

13. The Regional Municipality of Sudbury is a separate municipal entity that is located *within* the District of Sudbury. The Town of Nairn Centre is also in the District of Sudbury, and is adjacent to the Regional Municipality of Sudbury. The E.B. Eddy mill mentioned above, is in or near the Town of Nairn Centre, *within* the District of Sudbury, and *just outside* the Regional Municipality of Sudbury.

14. As a practical matter, what divides the parties is whether the group of employees at the E.B. Eddy mill should be included or excluded from the bargaining unit. The union proposes that the bargaining unit description should be confined to the Regional Municipality of Sudbury - thereby excluding the cluster of Burns employees working at the site of the E.B. Eddy mill. The employer asserts that the bargaining unit should encompass all employees within the District of Sudbury - which would include both the Regional Municipality, and the Town of Nairn Centre where the E.B. Eddy mill is located.

15. With this background, we return to the particular items in dispute.

All “security guards” or “all employees”

16. The employer proposes that the bargaining unit be confined to “*security guards*” and points to quite a number of Board certificates which have been so limited. The union proposes that the bargaining unit encompass all *Burns employees* working in the debated geographic area. The union points out that “all employee” units are the norm, and that “security guard units” are an anomaly which need not be perpetuated.

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17. We are inclined to accept the union’s position.

18. It is true that, at one time, the Board’s practice was to fashion homogeneous bargaining units, consisting solely of security guards. But that practice was rooted in to a legislative regime which, until 1993, prevented “guards” from being mixed with other employees, and even limited the ability of guards to join unions which admitted other kinds of employees to membership. Since January 1993, however, those restrictions have been substantially relaxed; and, in consequence, the previous Board practice is much less persuasive than it otherwise might have been.

19. As things now stand, all of the employees affected by this application are “guards”, and there is no indication that the company intends to hire anyone else. There was initially some dispute about whether there should be a specific exclusion of office staff, clerical staff, sales staff, and students employed during the school vacation period; but we were advised by counsel at the hearing that the parties had resolved that dispute and that the employer was no longer pressing for this specific exclusion. Accordingly, the practical effect of the employer’s proposal to limit the unit to a particular *classification* is the exclusion of any other *classifications* that might be added in the future - presumably on the assumption that if the company were to employ such workers, they would not have a community of interest with “guards”.

20. But the Board does not normally exclude non-existent classifications unless it can be said, with considerable certainty, that the possible “add-ons” constitute a generic group with a manifestly-separate community of interest; moreover, in recent years, the Board has been much less moved than it once might have been by white collar/blue collar distinctions or position on some notional job hierarchy. Indeed, in the Board’s experience, quite diverse groupings have been able to function together without any serious labour relations problems; and it is not obvious to us

that if other workers were added to the employer's complement, their inclusion in a bargaining unit would generate any serious labour relations problems.

21. It must be remembered that in a typical industrial setting, the Board regularly certifies "all employee" units without regard to the particular classifications, skill mix, or work the employees do. Employees do not leave the bargaining unit when they change duties, nor will new employees find themselves outside the bargaining unit simply because they do work which is different from other employees. Ordinarily ("craft" units aside) bargaining units are not defined with reference to work.

22. In the instant case, we see no reason to depart from the Board's usual practice of refusing to exclude non-existent classifications; or, to put the matter another way, we see no reason to reject the union's proposed "*all-employee* unit".

Regional Municipality of Sudbury vs. District of Sudbury

23. The "geographic dispute" centres on whether the bargaining unit should be limited to the Regional Municipality of Sudbury (the union's position) or should encompass the entire District of Sudbury (the employer's position). As noted, the practical consequence of the employer's (broader) unit is to sweep in a group of employees at the E.B. Eddy plant whom the union has not sought to organize.

24. The union asserts that the Board has a well-established practice of linking bargaining rights to municipal descriptions. That is what the union urges the Board to do here. The union also points out that bargaining unit need not be the *most* appropriate one, but only *an* appropriate unit in the circumstances of the particular case.

25. The employer asserts that the employees in the "Sudbury area" all have a "community of interest", and that it would be artificial to subdivide those employees working in Nairn Centre from fellow employees working nearby in the Regional Municipality of Sudbury. To avoid that artificial subdivision, the employer proposes that the bargaining unit refer to the *District* of Sudbury.

26. It is not disputed that, in the security guard business, the Board has found quite a variety of bargaining unit descriptions to be appropriate. Those units have been as narrow as a single client site (the client's address) and as broad as the Regional Municipality of Ottawa-Carleton. In between, the Board has found to be appropriate municipal units of various sizes, and even combinations of municipalities. There is no evidence before us of any particular labour relations problems flowing from one or other of these configurations - although one might hypothesize that broader units are more stable, while narrower units more closely reflect particular employee terms and conditions of employment, which, as noted above, are linked to the client's service contract.

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27. Several years ago, in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board undertook a review of its traditional approach to bargaining unit determination. The Board noted at paragraph 14:

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time

employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional “blue collar” industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal “inside workers” (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board’s decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost “class”) divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is “inappropriate” to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

The Board signalled its intention to be more flexible and forensic about bargaining unit structure, then went on to say:

... We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

(emphasis added)

If the unit applied for meets that simple test, it serves no purpose to litigate alternative bargaining unit configurations, nor does the term “community of interest” usually provide much guidance to what is an appropriate bargaining unit. All employees share a “community of interest” by virtue of working for the same employer, and “real life collective bargaining” seems to be able to accommodate groups with quite different duties and conditions, who one might still argue had a separate “community of interest”.

28. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the Statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.

29. These goals must be harmonized within a framework that now recognizes (as early Board “policies” might not) that there is no single unique and indisputably “appropriate” unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in *Hospital for Sick Children* put it) “serious labour relations problems”. A trade union need not seek to represent the *most* comprehensive or *most appropriate* bargaining unit; and as the applicant or moving party, the

union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit that it applies for. The focus is on concrete problems rather than the sometimes nebulous concept of "community of interest". Thus, in *Homewood Health Centre*, [1992] OLRB Rep. Feb. 181, the Board observed:

4. These historical distinctions (full-time/ part-time, white collar/blue collar, single location/multiple location) are useful guidelines for discerning what is an appropriate bargaining unit in any particular case, however, in *Hospital for Sick Children*, the Board acknowledged that there may be some considerable variability without in any way compromising the policy objectives which the concept of "appropriateness" was designed to achieve. In the Board's experience, a single department or location or employee grouping was often appropriate in the particular context, but by the same token, some broader grouping encompassing several departments, locations or groupings could be equally appropriate or more appropriate without compromising the policy objectives underlying section 6(1). Indeed, broader groupings are generally more desirable than narrower ones, because they avoid the labour relations problems associated with fragmented bargaining structures (see, for example, the concerns raised in cases such as: *Bestview Holdings Ltd.*, [1983] OLRB Rep. Aug. 1250, *Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, or *Board of Education for the City of Toronto*, [1986] OLRB Rep. June 900). But these general considerations should not be elevated to the level of legal rules or become the focus of litigation. If a union applies for certification for a unit which is appropriate, it is entitled to that unit even though there is a plausible alternative description which would also be appropriate. That is why the Board in *Hospital for Sick Children* preferred this formulation of its task under section 6(1):

Does the unit which the union seeks to represent encompass a group of employees with a sufficiently-coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

And that is why the Board considered it necessary to express the concerns emphasized at paragraph 23 of the decision in *Hospital for Sick Children*.

30. These passages suggest a more flexible approach, focusing on the problems caused or averted by particular bargaining unit configurations, rather than so-called Board policies that may or may not reflect current labour relations realities. This is not to say that history or existing practices are irrelevant. History can be a useful guideline to what is appropriate because established practice may reveal what works and what does not. And, of course, there is some virtue in certainty and simplicity - hence the Board's inclination to define bargaining units with respect to the geographic municipality in which the employer operates. But as the practice in the security industry amply illustrates: multiple locations, or even multiple municipalities may also be appropriate bargaining units.

31. In the instant case, the union seeks to represent a definable grouping of employees in a defined geographic area. There is no evidence to suggest that defining the bargaining unit in this way (thereby excluding the E.B. Eddy group) will generate serious labour relations problems - although, no doubt, the broader employee grouping might also be appropriate. This is not a case like *MDS Health Group*, [1993] OLRB Rep. Sept. 849, or *Hornco Plastics Inc.*, [1993] OLRB Rep. May 411, where the union's proposed unit would not encompass a stable employee grouping or a stable body of work. Here there is no interchange of employees between Nairn Centre and the Regional Municipality of Sudbury such that the geographic perimeter would be artificial or would not encompass a fixed group of employees or their work. And as we have already mentioned, this industry displays a wide variety of bargaining unit configurations without apparent difficulty (perhaps because, in practice, conditions must also be site-specific). In any event, we are satisfied that

a bargaining unit defined with reference to the Regional Municipality of Sudbury is *an* appropriate one.

32. Having regard to the foregoing, the Board finds the following unit to be appropriate for collective bargaining:

all employees of Burns International Security Services Limited in the Regional Municipality of Sudbury, save and except Field Supervisor, persons above the rank of Field Supervisor, and Timekeeper/Secretary.

Clarity Note

The Board notes the parties' agreement that the timekeeper/secretary position must be excluded from the bargaining unit because the current incumbent in that position exercises functions mentioned in section 1(3) of the Act.

33. The Board is satisfied, on the basis of all the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on December 21, 1993, the certification application date, had applied to become members of the applicant on or before that date.

34. A certificate will issue to the applicant.

3093-93-U United Steelworkers of America, Applicant v. Canadian Corps of Commissioners (Toronto and Region), Responding Party

Sale of a Business - Security Guards - Predecessor providing security services to condominium building - Successor characterizing its operations as reception functions - Successor seeking to distinguish between concierge and patrol services - Board finding services provided by successor to be security services, that those services related to servicing the premises under section 64.2 of the Act, and that services provided by successor substantially similar to those provided by predecessor

BEFORE: *Judith McCormack*, Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

APPEARANCES: *P. Turtle*, *Omero Landi* and *Michael Arimah* for the applicant; *C. G. Riggs*, *Catherine Peters*, *Col. M. Rich* and *Capt. A. Griffiths* for the responding party.

DECISION OF THE CHAIR, JUDITH MCCORMACK, AND BOARD MEMBER R. R. MONTAGUE; April 25, 1994

1. This is an application under section 91 of the *Labour Relations Act* in which the applicant alleges that the Canadian Corps of Commissioners ("the Corps") has violated section 81 of that Act. Central to the applicant's case is the assertion that the circumstances before us fall within the ambit of section 64.2. The parties advised us that it would be helpful if we ruled on several of the issues in dispute with regard to section 64.2 first, and we have agreed to do so.

2. Many of the facts in this matter were not in dispute. In April of 1993, the applicant applied to represent employees of Metropol Security Services, a division of Barnes Security Ser-

vices Ltd. ("Metropol"). The employees who were the subject of the certification application worked at Century Plaza at 24 Wellesley Street West in Toronto, a building managed by Park Property Management. In July of that year, Park Property Management declined to renew the contract for Metropol, and instead engaged the services of the Corps.

3. We heard extensive evidence with respect to the nature of the services provided by Metropol and the Corps respectively. In large part, these services were either identical or similar. Both companies stationed a uniformed employee at the front desk in the lobby on a twenty-four hour basis. The front desk includes a bank of four television screens monitoring twenty-four cameras positioned inside and outside the building. The employee stationed at this location controls access to the building, since the doors are locked. Tenants have their own keys, but others including visitors, tradespeople, canvassers and so forth must identify themselves to the front desk employee. He will then check with the tenant. If no authorization is given by the tenant, or no advance authorization has been arranged, the person will not be admitted or allowed to remain in the building. Access is tightly controlled, as illustrated by the fact that even police officers may be denied entry in certain circumstances.

4. The employee staffing the front desk also monitors garage access, including issuing visitor parking permits. He will take delivery of parcels and other articles, and maintains various records with respect to keys, deliveries, and other matters. In addition, he controls the issuance of keys for a variety of purposes. Part of the job involves answering the telephone at the front desk, where tenants may file requests for maintenance or request assistance with respect to lost keys or other emergencies. Post orders for the front desk include a list of contact people in the event of a fire, bomb threat, injury, power failure, heat loss, or flood. If an incident occurs involving personal injury, damage to property or criminal activity, an incident report must be filed by the employee.

5. There are several minor differences between the services provided by Metropol and those provided by the Corps. However, there are only two distinctions of any significance. Firstly, on the evening and night shifts, Metropol posted two employees to Century Plaza, one to staff the front desk, and the other to patrol the building. On the day shift, there was only one employee stationed at the front desk. The parties referred to the front desk duties as concierge services, and the other functions as patrol services. In contrast, the Corps provides only one employee for the front desk on all three shifts. There is no patrolling done, except for a very brief period at 1:00 a.m. and 6:00 a.m. when the employee locks and unlocks a number of doors in the building. The Corps originally submitted a proposal to provide both concierge and patrol duties, but eventually contracted to provide the concierge duties. Secondly, Metropol employees put warning notices on cars in the visitors parking area and on occasion, arranged for them to be ticketed by police and towed away. The Corps employees do not perform this function. Another security company now tickets visitors cars, although it does not arrange for towing.

6. It also appears that since the Corps took over, tenants holding a large party in the recreation area will sometimes arrange for other security services as well to screen visitors at the party door. It is not clear what role Metropol employees had previously in these situations. The Corps employees continue to monitor the premises through the cameras and screen visitors at the front door on these occasions. They also lock up the recreation area at the designated time.

7. It is in these circumstances that the Corps argues that it does not provide services that are related to servicing the premises under section 64.2, that the services provided are not security services, and that the services are not substantially similar to those which were provided by Metropol.

8. Section 64.2 provides as follows:

64.2-(1) This section applies with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.

(2) This section does not apply with respect to the following services:

1. Construction.
2. Maintenance other than maintenance activities related to cleaning the premises.
3. The production of goods other than goods related to the provision of food services at the premises for consumption on the premises.

(3) For the purposes of section 64, the sale of a business is deemed to have occurred,

- (a) if employees perform services at premises that are their principal place of work;
- (b) if their employer ceases, in whole or in part, to provide the services at those premises; and
- (c) if substantially similar services are subsequently provided at the premises under the direction of another employer.

(4) For the purposes of section 64, the employer referred to in clause (3)(b) is considered to be the predecessor employer and the employer referred to in clause (3)(c) is considered to be the successor employer.

(5) This section shall be deemed to have come into force on the 4th day of June, 1992.

9. The effect of section 64.2 is to extend the reach of the sale of business provisions under section 64 to cases where there is a changeover in contracted services, whether or not there is a transaction or nexus between a predecessor and successor employer. The purpose of section 64 was described in *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193 in the following manner:

26. The legislative history in this jurisdiction reveals an unbroken trend towards increased protection for employees and their union, and a concomitant increased obligation imposed upon successor employers. Legal doctrines such as “the corporate veil” or “privity of contract” have been de-emphasized, modified or eliminated so that a collective bargaining framework can be developed which will be in accord with industrial relations realities. Not surprisingly, the Board decisions follow a similar trend and, as a result, early decisions do not provide an unfailing guide to the results in later ones. Not only has there been a change in the statutory framework, but as the Board has accumulated experience and encountered more sophisticated business arrangements, there has been a development of its jurisprudence. It is important to emphasize, however, that section 55 of the Act has never been regarded merely as an “unfair labour practice” provision, directed at “schemes” designed to subvert bargaining rights. The section is also intended to preserve bargaining rights in the case of *bona fide* business transactions (i.e., transactions undertaken for purely commercial reasons and untainted by any anti-union motivation) which *incidentally* undermine the industrial relations *status quo*. This two-fold purpose was discussed by the Board in *Aircraft Metal Specialists Ltd.*, [1970] OLRB Rep. Sept. 703:

“The purpose of section 47a [now section 55] becomes important in assessing the various fact situations that arise. Section 47a operates on a number of levels. The first level, of course, is to prevent the subversion of bargaining rights by transactions which are designed to get rid of the union. We have encountered situations where there are transactions between various corporate entities which are in effect “paper transactions”, and are a form of corporate charade engaged in for the purpose of eliminating the trade union. In this type of case the Board has liberally interpreted section 47a to preserve the bargaining rights and has attempted to look beyond

“paper transactions” to achieve that purpose. See e.g. *Kem’s Masonry*, [1964] OLRB Monthly Rep. December 382 and *Trenton Riverside Dairy*, September 1964 (1964) 2 C.L.S. 76-1005.

A further and important purpose of section 47a is to preserve the bargaining rights with respect to work which has accrued to the benefit of the employees as a result of their union becoming the bargaining agent through certification or voluntary recognition. Once the union had been recognized with respect to a particular business the union then obtains a right to bargain with respect to wages, hours and other conditions of employment in that business. The right to participate in the business and its functions in that manner is in the nature of a vested right and section 47a allows the union to pursue that bargaining right when all or part of the business is sold. In making determinations under section 47a therefore, the Board is interested in maintaining the bargaining rights where the sale involves a continuum of the business.”

In recent years most of the litigation before the Board has involved increasingly complex, but *bona fide*, business transfers which result in the same kind of dislocation as a simple bilateral sale. Collusive arrangements, or transactions explicitly designed to subvert bargaining rights have become much less common; and can, in any event, be dealt with under sections 56, 58 and 61 of the Act. (See, for example: *Sun Parlour Greenhouse* [1964] OLRB Rep. Jan. 94; *Intermountain Industries Ltd.*, [1975] 1 Can. LRBR 257 (B.C.L.R.B.); *Academy of Medicine*, [1977] OLRB Rep. Dec. 783; and, more recently, *Humber College*, [1979] OLRB Rep. June 820.)

10. In *Marvel Jewelry and Danbury Sales (1971) Ltd.*, [1975] OLRB Rep. Sept. 733 the Board made these observations:

Section 55 [now section 64] recognizes that collective bargaining rights, once attained, should have some permanence. Rights created either by the Act or under collective agreements, are not allowed to evaporate with a change of employer. To provide permanence, the obligations flowing from these rights are not confined to a particular employer, but become attached to a business. So long as the business continues to function, the obligations run with that business, regardless of any change of ownership.

11. More recently, the Board made these comments with respect to section 64.2 itself in *Accomodex Franchise Management Inc.*, [1993] OLRB Rep. April 281:

51. Finally, if there is any doubt that the concept of successorship is a rather unique, policy-laden creature of statute, one need only consider section 64.2 which came into force on January 1, 1993. It deems a “sale of a business” to have occurred between independent suppliers of services, even though there may be no sale or disposition of anything between them at all, and the legal successor acquires from its predecessor none of the assets, equipment, etc. needed to supply the services. Bargaining rights attach to a relationship between employees, their work, and their workplace, regardless of who happens to be employing them from time to time. Under section 64.2 bargaining rights are maintained so long as there is a continuity of work done by unionized employees in that particular location.

Thus the effect of section 64.2 is to protect the stability of bargaining rights even where the contract for certain work changes hands.

12. The Corps urged us to interpret section 64.2 in a more restrictive and technical way than the Board has approached section 64. In counsel’s view, the language of section 64.2 was promissory, and the fact that it dealt with deeming provisions made a broad or holistic approach inappropriate. He conceded, however, that section 10 of the *Interpretation Act* applied to our interpretation of this provision. Thus it seems to us that we are required to construe section 64.2 in the same fair, large and liberal manner that is mandated by that section:

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the

doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

Of course, to the extent that section 64.2 may be more specific than section 64, its application may also be more specific, but that would result from its language and intent, rather than a different interpretative approach.

13. With this in mind, we turn to the other arguments advanced by the Corps. All three of those arguments are related to a characterization of its operations as reception functions, which provide only a personal service to tenants. We do not think such a characterization accurately reflects the facts before us. There is undoubtedly a personal service component to some of the services provided. However, it is often related to a security function. For example, a tenant may leave a key with the front desk to be delivered to an identified tradesperson to work in his or her suite. Although it is a reasonable inference from the evidence before us that it is convenient for tenants to be able to arrange for entry to their suites during their absence, it is also part of the access control exercised by Corps employees for security purposes.

14. There are some functions which appear to be purely personal services, such as accepting maintenance requests over the telephone. These are a relatively small portion of the overall responsibilities of the Corps employees, and do not suggest to us that the services as a whole are not security services. Among other things, we observe that the language of section 64.2 is inclusive rather than exhaustive, and that it does not stipulate that the services provided by a company must be *exclusively* directed at security. There is nothing to prevent a company from providing more than one kind of service to a client. As well, we do not doubt that employees are expected to be courteous to tenants and that “people skills” are required of these employees, as the Corps’ evidence indicated. It was apparent, however, that the delivery of security services is likely to involve a public relations aspect, and this alone does not indicate that the services provided are not security services.

15. Counsel for the Corps appeared to suggest that the fact that the Corps employees were not expected to intervene aggressively in situations which might arise in the building was indicative in defining the kind of services provided. It is clear that generally speaking, employees were instructed to contact police or other authorities when problems arose. However, the evidence indicates that surveillance through the television monitors and access control amounted to a significant portion, if not the majority of the position functions. It would be difficult to say that these are not security services. The fact that all possible security services are not being provided does not change the character of the ones that are. An overall view of the Corps’ operations at Century Plaza supports the conclusion that the services provided, whether described as concierge duties or not, are in fact security services.

16. Another argument made on behalf of the Corps was to the effect that the services were directed towards the tenants rather than the building, and that as a result, they do not relate to servicing the premises within the meaning of section 64.2(1). We note, however, that although section 64.2 is inclusive, it goes on to make specific reference to building cleaning, food and security services. This provides us with some clues as to some of the kinds of services it was contemplated would attract the application of these provisions. While cleaning services may be administered to a building structure, the purpose is to provide clean offices or residences to people. Food services are entirely directed towards people, who may work, live or wish to eat at a particular location. Security services may extend protection to people, their possessions and/or the building. In other words, the nature of the services will determine to some extent what is involved in “servicing the

premises”. In this context, we do not find a distinction between the physical structure and the activities carried out in it to be particularly useful. There is no question that the language of section 64.2 reflects an intention that the premises will provide some kind of physical anchor for the application of the section. At the same time, the use of the wording “*related* to servicing the premises” suggests the connection to the premises may be considerably less specific than that urged upon us by the Corps.

17. This brings us to the argument that the Corps’ services are not substantially similar to those provided by Metropol, an argument which rests largely on the two differences between the services described above. The first involves the absence of a patrolling employee on the evening and night shifts. We think, however, that there is some merit to the applicant’s contention that the patrolling employee provided by Metropol operated in essence as an additional set of eyes and ears for the front desk employee. As noted previously, the evidence indicated that if the patrolling employee encountered a problem, he generally radioed to the front desk employee, who would then take the appropriate steps such as calling the police. It was clear as well that the main functions of the patrol were to monitor the building and to lock and unlock various doors. Both of those functions are still being carried on to a significant extent by the front desk employee, who monitors the twenty-four building cameras and locks and unlocks doors at certain points in the night shift.

18. There is no doubt that there are some differences, however, both in the extent of the surveillance function and with respect to the ticketing of cars in the visitor parking area. In addition, the patrolling employee seems likely to have had a greater degree of interaction with tenants away from the lobby. Nevertheless, section 64.2 requires only that the services be “substantially similar” to those provided previously. This is in contrast even to the phrase “substantially the same” found in the *Employment Standards Act* cases submitted by the Corps. It is also quite distinct from the language of section 64(5.1) which provides that the Board may terminate bargaining rights if a successor employer has changed the character of the business so that it is “substantially different”. We do not find it necessary for the purposes of this case to analyze the relationship of section 64.2(3)(c) to section 64(5.1). Suffice it to say that both the plain meaning of the phrase “substantially similar” and the context in which it operates suggests a breadth of application which would encompass the facts before us.

19. Nor do we find the distinction between concierge and patrol services particularly helpful in this context. There appears to be some overlap in the actual duties performed by the concierge and patrol employees, such as the locking and unlocking of doors. More importantly, however, there is a significant overlap in function. The patrolling employee monitors the building on foot; the concierge employee monitors the building through cameras. In both cases, the service provided is surveillance. We observe as well that there was no patrolling employee provided by Metropol previously on the day shift. In other words, we do not think the extent of the differences between the services provided by Metropol and those provided by the Corps support the proposition that they are not substantially similar.

20. In conclusion, then, we find that the services provided by the Corps were security services, that they were related to servicing the premises at 24 Wellesley Street West, and that they were substantially similar to those provided previously by Metropol. As a result, it is not necessary for us to address the applicant’s alternative argument that section 64.2 incorporates by reference to section 64 a deemed sale of part of a business.

DECISION OF BOARD MEMBER JAMES A. RONSON; April 25, 1994

1. From humble beginnings as a remedial measure to combat the practice of “double breasting” in the construction sector, section 64 of the *Labour Relations Act* is now apprehended by some as the panacea for successor rights demands. But to anyone familiar with the legislative and jurisprudential history of section 64 the recent amendments to that section, (embodied in section 64.2), will appear as being rather oddly worded.

2. The Board has never used a mechanical, legalistic or commercial approach in its application of section 64. It has always used a large and liberal rather than a narrow interpretation. In that spirit I approach the interpretation of section 64.2 carrying a broad brush. And it is thus with some surprise that I find that the Legislature has *not* confirmed the Board’s liberal approach in the enactment of section 64.2.

3. I find that section 64.2 takes away rights that would otherwise not be caught by section 64. It is a “deeming” provision, creating the paradox of a fact situation which is not a “sale” under section 64 being deemed to be a “sale” covered by that section. It seems to me that since it takes away rights that would not otherwise be caught by section 64 the Board is forced by the Legislature to approach section 64.2 with a stricter, more focused attitude. I do not think anyone would argue that the Legislature wanted the Board to strip away *more* rights than what was intended by the clear wording of the section.

4. When I focus on the three conditions found in section 64.2 (3) that are necessary for a deemed sale, I find that the Legislature has chosen to emphasize substance and not form. It does so by requiring that the services provided by the new (“another”) employer in section 64.2(3)(c) be “substantially similar” to those services which the old employer has ceased to provide as defined in section 64.2(3)(b). It would appear that, consciously, the Legislature chose not to say “the *same* services” in section 64.2(3)(c) for, as experience has shown, that would involve future fights over trivial differences. By its choice the Legislature has decided *not* to have the Board enquire into the character of the business as would normally be required by the pre-existing wording of section 64. Rather than being told to analyze the character of the services (which would require a whole range of options), the Board is told to focus straightly and simply on the “services” no longer provided and newly provided by the old and the new employer respectively and decide if they are substantially similar. And if they are not, then there cannot be a deemed “sale”.

5. The responding employer (“the Corps”) provides concierge or receptionist services at the front door of a residential condominium. The previous employer (“Barnes”) provided the same service together with a wide range of security services. Barnes’ employees patrolled the perimeter of the building and the parking garage. They patrolled the electrical and boiler rooms. They patrolled the games and party room and the floors and stairwells. They were constantly checking locks and checking strangers to the building. The Corps does not provide these services. In fact some of them are provided now by a third employer which was not a party before the Board in this matter.

6. To me it is clear that a substantial part of Barnes’ services that ceased pursuant to section 64.2(3)(b), are *not* being performed by the Corps. (We were told that the Corps did not want that work.) And if a substantial part of the services by Barnes that ceased are not done by the Corps then it cannot be said that the Corps is providing “substantially similar services” so as to bring it within the ambit of section 64.2(3)(c).

7. Therefore there is no deemed “sale” under section 64.2 and no need to deal with the other issues raised by the Corps. This application must fail and I would order that it be dismissed.

4044-93-R United Food & Commercial Workers International Union, Local 175, Applicant v. Canadian Tire Petroleum, Responding Party

Bargaining Unit - Certification - Union seeking to represent employees of gas bar at single location in Thunder Bay - Employer operating two gas bar locations in municipality - Employer proposing municipal unit - Board finding union's proposed unit appropriate - Representation vote ordered

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

APPEARANCES: *Caroline Cohen*, *Bill Kalka* and *John Fuller* for the applicant; *W. G. Phelps*, *Isabel Smith* and *Millie Garbaz* for the responding party.

DECISION OF GAIL MISRA, VICE-CHAIR, AND BOARD MEMBER K. DAVIES; April 8, 1994

1. This is an application for certification.
2. The two issues between the parties are the description of the bargaining unit and the composition of the list of employees for the purpose of the count.
3. The applicant seeks to represent employees in the following bargaining unit:

All employees of Canadian Tire Petroleum at 508 W. Arthur Street, Thunder Bay, Ontario, save and except the Manager and persons above the rank of Manager.

4. The responding party operates two gas bar locations, one at W. Arthur Street (hereinafter referred to as Arthur St.) and the other at Fort William Road (hereinafter referred to as Ft. William Rd.), in the city of Thunder Bay. It therefore proposes the following bargaining unit description:

All employees of Canadian Tire Petroleum at the City of Thunder Bay, Ontario, save and except the Manager and persons above the rank of Manager.

5. Canadian Tire Petroleum is a corporate entity which operates gas bars across Canada. Isabel Smith, the Human Resources Consultant for the responding party, and Millie Garbaz, the Manager for the two gas bars in Thunder Bay, testified on behalf of the responding party. The applicant called no evidence.

6. It was Ms. Smith's evidence that the two gas bars were three to four miles apart in Thunder Bay. The employees at both locations were on the same wage scale and benefit plan, and the holiday, vacation, and other policies and employment conditions were the same for both locations. Ms. Smith had conducted a joint training seminar for the employees of the gas bars. Canadian Tire Petroleum has no unionized locations in Canada. The Ft. William Rd. location is referred to by the head office as #948 and the Arthur St. location is known as #676.

7. The parties were agreed upon the following facts: There is joint advertising conducted for the two locations; non-gasoline products sold at the gas bars are routinely switched back and forth between locations if one location is short of a product; supplies are shared; mail for both locations is delivered to the Ft. William Rd. location and the Manager takes the Arthur St. mail to that location; sub-contracting of snowplowing and the provision of flags is done centrally for both locations; and, the employees at each location contact employees at the other location for information on procedures when necessary.

8. It was Ms. Garbaz' evidence that she had been the Manager of the two gas bars since the spring of 1993. Until that point each location had its own Manager and Ms. Garbaz had been the Manager at Ft. William Rd.. Following her take-over as joint Manager and until around November, 1993, she herself would fill in for any staff who were absent. It was her recollection that she worked about one extra shift per month for this purpose. The Arthur St. employees could not work hours for which they were not scheduled as those employees had other commitments. Hence, when an Arthur St. employee called in sick or was absent for any reason, Ms. Garbaz could not find a replacement worker from among the Arthur St. employees. After November, 1993, she began to offer the unscheduled hours to Ft. William Rd. employees as some of them did not have scheduling limitations.

9. In her capacity as Manager of the two gas bars, Ms. Garbaz spends some time daily at both locations, holds joint staff meetings for the employees of the two gas bars, and hosted a joint Christmas party in December 1993. There was evidence of a "Mystery Shopper" who visits both locations to observe and report to the responding party on the service at the gas bars. This individual's identity is unknown to any staff in Thunder Bay.

10. The Arthur St. location is a 24 hour a day operation. The Ft. William Rd. location is open from 6:00 a.m. to midnight, Monday to Saturday, and on Sunday from 9:00 a.m. to 9:00 p.m..

11. Ms. Garbaz hires all staff for the two locations, but employees are allocated to one or the other location and are told there could be work available at either site. Employees have a time card at their home location and separate schedules are prepared for each location. Only in emergencies are employees from another site called to fill in if they are available.

12. The following employees from Ft. William Rd. worked at Arthur St. between the November 1993 and the date of application, February 21, 1994: On November 9, 1993, and on February 21, 1994, Chris Engelmann worked at Arthur St.; Ruth Fraser worked at Arthur St. on February 5, 1993; and Lisa Clikwik worked at Arthur St. on November 20, 1993. There was no evidence of any Arthur St. employee working at Ft. William Rd. and there were no interchanges in December, 1993, or January, 1994.

13. We decline to consider evidence of interchange subsequent to the application date having regard to the fact that an employer has the ability to affect the very facts under litigation.

14. As outlined above, the applicant is seeking a bargaining unit comprised of the W. Arthur St. location only, while the responding party is seeking a municipality-wide bargaining unit.

15. The responding party argued that its unit was the appropriate unit for collective bargaining so as to limit labour relations problems and to avoid fragmentation. It argued that the level of interchange between the locations was significant and that the operations of the two gas bars were integrated as evidenced by the testimony of the witnesses. While there was no evidence of serious labour relations problems which may result from a finding of the applicant's unit as appropriate, in argument it was postulated that should the applicant's unit be accepted, there would be problems of misunderstandings between the gas bar personnel and friction may result; if employees transferred from one location to the other their seniority would be a question; during temporary transfers what dues would the transferees have to pay; and, in the event of a strike, would the temporary transferees be considered members of the bargaining unit.

16. The responding party relied on a number of decisions for the proposition that the Board should seek to minimize fragmentation in shaping units to facilitate viable and stable collective bar-

gaining. Where the fragmentation would occur within a workplace the Board, subject to the facts of each particular case, has tended to prefer the more comprehensive bargaining unit on the basis that restrictions on mobility between bargaining units may ensue; jurisdictional disputes over work allocation between bargaining units may emerge; the employer may have to contend with differently timed work stoppages; and the administrative costs to the employer of bargaining a number of collective agreements within one workplace would cause undue labour relations problems.

17. However, in a retail environment and where there may be more than one location of a business operating within a municipality, the considerations may be different. In such decisions as *K Mart Canada Limited*, [1981] OLRB Rep. Sept. 1250, and *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330, the Board has recognized that it cannot disregard the labour relations realities before it. A broader-based bargaining structure may have to be rejected if it would impede access to collective bargaining, especially in an industry which has not traditionally had access to organizing and collective bargaining. In *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523, the Board, quoting from *Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, endorsed the following:

... The decision in *K Mart Canada Limited*, *supra*, at paragraphs 18 to 20, provides an apt illustration. The employer operated four stores in one municipality, the union had organized one at which 127 employees worked, and a certificate was granted for this unit. A broader-based structure was rejected, because it might significantly impede access to collective bargaining. However, the Board suggested it would have been “hard pressed” not to certify a municipal unit if the union had organized all four stores, suggesting a consolidated structure would lead to more effective collective bargaining than several smaller units. In other words, the viability of ongoing collective bargaining was compromised to this extent in order to foster self-determination.

18. Similarly, in *Canada Trustco Mortgage Company*, [1977] OLRB Rep. June 330, the Board said:

In determining the appropriate bargaining unit the Board cannot disregard the labour relations realities before it. When a group of employees signify that they wish to exercise their right to bargain collectively, and that grouping is seen by the Board as sufficiently conforming to the Board’s criteria of appropriateness as a bargaining unit, this Board should not require bargaining in a more comprehensive unit if to do so would effectively impede the access of that group of employees to any collective bargaining at all.

19. In *K Mart Canada Limited*, *supra*, the Board was of the view that in sectors like the department store sector where collective bargaining had not “taken a foothold”, the Board “will lean towards the bargaining structure which best facilitates organization”. The gas bar industry is one in which collective bargaining has not taken a foothold. The evidence in this case was that there are no Canadian Tire Petroleum gas bars organized anywhere in Canada and neither party drew the Board’s attention to any cases of organizing of employees in this industry.

20. In a recent decision, *Cineplex Odeon Corporation*, [1994] OLRB Rep. Jan. 25, the Board was asked by the responding party to find the appropriate bargaining unit to be a unit covering the Greater Toronto area or one for the regional municipality, contrary to the applicant’s proposed one cinema site unit. The evidence in that case was that the employees of the various theatres performed the same work, had the same general terms and conditions of employment, each theatre had a manager although ultimate control lay with the district manager, there was some interchange of employees between theatres but on a voluntary basis so that employees from one location may be offered additional shifts at another location. In that case, as in the one before this panel, the responding party argued that the situation was analogous to *MDS Health Group Limited*, [1993] OLRB Rep. Sept. 849, and that the Board should therefore find the municipality-wide unit as the appropriate unit, especially since the union had not called any evidence to show

that there had been significant impediments to organizing on a broader basis than the union had done.

21. As noted by the Board in *Cineplex Odeon Corporation, supra*, the cinema business was very different than the business in *MDS Health Group Limited, supra*, and we would note that the gas bar industry is again far removed from that in MDS. In addition, in MDS there was movement of personnel and work between locations on a regular basis and some employees at locations in MDS would have been disallowed access to collective bargaining as only one person worked at a number of the branches. While there is some evidence of interchange in the case before us, it only includes employees coming from the Ft. William Rd. location to the location being organized by the applicant. Those employees who did work at Arthur St. did so voluntarily to fill in for Arthur St. employees who were absent or unavailable for work on a scheduled shift.

22. Since the *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, decision the Board has on numerous occasions considered whether a bargaining unit is appropriate on the basis of whether or not it encompasses a grouping of employees viable for the purposes of collective bargaining without causing serious labour relations problems for the employer. Where the grouping is considered viable, it will generally be recognized as a unit appropriate for collective bargaining even if it is not the most comprehensive unit or the most appropriate one.

23. On the basis of the evidence before this panel the majority finds the applicant's bargaining unit to be a viable grouping of employees for the purpose of collective bargaining. While the responding party has raised the spectre of some labour relations problems which may arise, these are matters which can be dealt with in collective bargaining and are in any event purely speculative. The two gas bar locations are separate entities, are treated by the central organization as such, and indeed, until the spring of 1993 had separate Managers. The level of interchange amounts to four examples of Ft. William Rd. employees accepting extra shifts at the Arthur St. location since the spring of 1993 and cannot be seen as substantial interchange. There is no labour relations detriment to the two locations continuing to share a Manager, supplies, service contracts, and information.

24. Although the majority is cognizant that fragmentation may occur as a result of a finding that one location is a unit appropriate for collective bargaining, those concerns must be weighed against the obstacles to organizing in an industry which has not heretofore been organized. If the Board were to find that a multi-location bargaining unit was the appropriate bargaining unit, it may seriously impede the ability of employees in the gas bar industry to have any access to collective bargaining. Given the language of section 2(1) of the *Labour Relations Act* and the purposes of the Act, it is the mandate of the Board to facilitate access to collective bargaining rather than to limit such access, especially for those employees who have not traditionally had access to collective bargaining. In *The Governing Council of The Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85, Alternate Chair MacDowell articulated the Board's position as follows:

19. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the Statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.

20. These goals must be harmonized within a framework that now recognizes that there is no single unique and indisputably "appropriate" unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in *Hospital for Sick Children* put it) "serious labour rela-

tions problems". A trade union need not seek to represent the *most* comprehensive or *most appropriate* bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for.

25. We find that all employees of Canadian Tire Petroleum at 508 W. Arthur Street in the City of Thunder Bay, save and except the Manager and persons above the rank of Manager, constitute a unit of employees of the responding party appropriate for collective bargaining.

26. The applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

27. The responding party took the position that there were eight employees in the bargaining unit for the purpose of the count. The applicant's position was that there were only six employees for the purpose of the count and it challenged the inclusion of Chris Engelmann and Ruth Fraser on the list. The applicant made no submissions to distinguish Mr. Engelmann and Ms. Fraser from other employees of the responding party. The majority finds that Chris Engelmann was an employee at work on the date of application for certification, working as a cashier, and he is therefore to be included in the count. Ruth Fraser worked as a cashier at Arthur St. on February 5 and February 27, 1994, and is therefore an employee within the bargaining unit governed by the 30/30 rule. There was no suggestion in the evidence of anti-union behaviour on the part of the responding party with respect to the utilization of these two employees.

28. We are satisfied, on the basis of all of the evidence before us, that not less than forty per cent of the employees of the responding party in the bargaining unit described in paragraph 25, on February 21, 1994, had applied to become members of the applicant on or before that date.

29. A representation vote will be held among the employees in the bargaining unit set out above. All those employed in the bargaining unit on the date hereof, who are so employed on the date the vote is taken, will be eligible to vote.

30. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.

31. The matter is referred to the Registrar.

DECISION OF BOARD MEMBER W. A. CORRELL; April 8, 1994

1. I cannot agree with that part of the majority award that finds that a serious labour relations situation will not arise by allowing a portion of an otherwise appropriate bargaining unit to be the subject of an application for certification. The Board on many occasions has found that "carve-outs" and "fragmentation" should be avoided and the Act has been designed in recent amendments to permit and encourage the combination of bargaining units presumably to advance and improve the chances of good labour relations.

2. I would find in this somewhat unique situation that the bargaining unit should include employees of both the Arthur Street and Fort William Road locations within the City of Thunder Bay. If the employees of the Arthur Street location need the services of a union, why deny the same opportunity of membership to the Fort William Road employees. After all, they work for the same employer, are managed by the same person, are paid under the same wage and benefit policies, and are administered by the same personnel policies, with working conditions of no difference except the matter of geography, and even then still close enough to be involved in some employee transfer interchange.

3. The splitting of such an organization into 2 groups, one union and one non-union for purposes of certification will result in friction, aggravation, and serious labour relations difficulties.
 4. If the certification is successful, those difficulties will begin with collective bargaining. The union will demand improvements in working conditions, wages and benefits to prove its usefulness and justify the union dues it will impose on its members. Management will have to resist such demands strenuously, or in the alternative pass along any improvements to its non-unionized employees who will then enjoy such benefits without paying union dues.
 5. In either event there will be friction and aggravation and that situation will certainly lead to labour relations difficulties from the very beginning. The other problems pointed out by company counsel and listed in paragraph 15 of the majority award will do nothing but intensify and guarantee continuing aggravation.
 6. There is no doubt in my mind that there is a community of interest within the larger unit of employees. The union's effort to organize the smallest unit available involved also the least effort. It results in a greater benefit for the union and its staff than it does for the employees. The small amount of effort and energy involved to organize employees of the smallest unit involved will be, if this certification is successful, an immediate benefit for the union but leaves for the future an unsatisfactory fit for the long-term interests of employees.
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3629-93-R Canadian Food and Allied Workers' Union, Applicant v. Caterair Chateau Canada Limited, Responding Party v. Hotel Employee's Restaurant Employee's Union Local 75, Intervenor

Trade Union - Trade Union Status - Intervenor union submitting that applicant union should be denied "status" because of irregularities related to ratification of constitution and requisite quorum at organizational meeting - Board satisfied that actions taken at organizational meeting sufficient to create organization, admit members, and to approve constitution - Board paying particular attention to manifest intention of participants, which was to create trade union for purpose of certification application - Board finding applicant to be "trade union" within meaning of the Act

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

DECISION OF THE BOARD; April 19, 1994

1. This is an application for certification. In a decision dated April 7, 1994, the Board certified the applicant as the bargaining agent of employees of the responding party employer. Since the applicant had not previously established before the Board that it is a "trade union" within the meaning of section 1(1) of the *Labour Relations Act* it was required to adduce proof of its status at a hearing held on February 21, 1994. In a decision dated March 4, 1994, the Board found that the applicant was a "trade union". The following are the Board's reasons for that finding.

2. The definition of "trade union" is found in section 1(1) of the Act and reads as follows:

"trade union" means an organization of employees formed for purposes that include the regula-

tion of relations between employees and employers and includes a provincial, national or international trade union, a certified council of trade unions and a designated or certified employee bargaining agency.

3. It was the evidence of Glen Hempel, who was the sole witness called by the applicant, that an organizational meeting was held on January 16, 1994 in a hotel room adjacent to the workplace of the employees concerned in this application. The purpose of the meeting was to discuss the formation of a trade union. Hempel stated that the employees in the bargaining unit presently at the respondent's operations had for some time been dissatisfied with the quality of representation provided by the incumbent trade union, and that the trade union he was seeking to form was for the express purpose of displacing the incumbent. Although he claimed that "word of mouth" notice was provided to the approximately 450 employees in the bargaining unit, only nine persons attended at the meeting. Upon the commencement of the meeting, it was unanimously agreed that a trade union should be "set up" for purposes of collective bargaining and more specifically, for the purpose of initiating the present displacement application. A constitution document, which had been prepared by the applicant's solicitor, was then placed before those attending at the meeting, and after two amendments, was unanimously agreed upon.

4. One of those amendments concerned the quorum requirement for the transaction of union business. Although the evidence was less than entirely clear, the Board finds that the requirement of Article 7(d), which in its draft form imposed a quorum requirement of "Twenty-Five (25%) percent of the total membership in good standing", were amended to read:

7. Membership Meetings

...

d) Quorum

Twenty-Five (25) members in good standing shall constitute a quorum at a regular or special membership meeting for the legal transaction of business.

In addition, Article 5 of the draft Constitution document, which for reasons undisclosed, stated that "The constitution was effected on February 17th, 1993" was amended to reflect a commencement date of January 16, 1994.

5. As indicated above, only nine persons were present at the time. Nevertheless, the amendments, which were discussed at the meeting, were passed unanimously and the handwritten amendments to the document were duly initialled by all those attending. Officers were then acclaimed, there evidently being no contest for the positions, and it appears that the attendees at the meeting each assumed an executive position. Only after these matters were dealt with did those present take any steps to become members of the organization. This was accomplished by signing union membership cards which were distributed at the meeting. There was no further step taken by the newly-formed "membership" to ratify the constitution that had been approved, nor was there any discussion of dues or membership fees that may be required to finance the operation of the organization. In this respect, it was the evidence of Hempel that, in the period between the formation of the organization and its eventual certification as the bargaining agent of the employees at Caterair, the executive would direct the organization and would contribute the necessary financing "out of their pockets". Indeed, although there is no specific provision in the constitution permitting such a practice, it is clear that the executive styled itself as an interim one pending certification and that elections for officers would be reheld in order to provide "all members and employees at Caterair" an opportunity to vote.

6. Based on the above facts, counsel for the intervenor trade union argued that the necessary prerequisites for trade union status had not been established by the applicant. In particular, counsel referred to the “five step” procedure set out in *Local 199 U.A.W. Building Corporation*, [1977] OLRB Rep. July 472, that, he contended, it was necessary for an applicant to undertake before the Board would confer trade union status upon an organization:

1. A constitution should be drafted setting out, among other things, the purpose of the organization (which must include the regulation of labour relations) and the procedure for electing officers and calling meetings;
2. the constitution must be placed before a meeting of employees for approval;
3. the employees attending such a meeting should be admitted to membership;
4. the constitution should be adopted or ratified by the vote of said members;
5. officers should be elected pursuant to the constitution.

7. Counsel argued that the applicant’s failure to abide by this relatively simple procedure was a basis for the Board refusing to recognize the applicant as a trade union under the Act. It was argued that the failure of the applicant to have its constitution ratified by the membership, and its failure to demonstrate the requisite quorum for any of the business it carried on at the January 16, 1994 meeting resulted in an organization without a constitution or validly elected officers and, in turn, created members of an non-existent organization. The Board’s procedures are clear, simple and served the important purpose of ensuring the viability of an organization seeking trade union status, and that for this reason, it was submitted, those rules ought to be stringently enforced. Counsel relied upon *G.K.L. Industries Ltd.*, [1985] OLRB Rep. Oct. 1464 and *National Steel Car Corporation Limited*, [1979] OLRB Rep. June 542 in support of that proposition.

8. While the “five step” procedure set out by the Board in *U.A.W. Building Corporation*, *supra*, remains a useful guideline both for the Board in determining the status of a trade union under the Act and for persons wishing to form a trade union, the Board has made it clear that that procedure is not the exclusive manner of establishing a trade union. (See, for example, *Service Employees International Union*, [1991] OLRB Rep. Feb. 267; *Local 199 U.A.W. Building Corporation*, *supra*.) As counsel for the applicant points out, in circumstances where the formation of the trade union has transpired at a single meeting, the Board has not required a strict adherence to the sequence of steps. (*Proctor-Lewytt*, [1969] OLRB Rep. Sept. 760.) Moreover, although the procedure contemplated by the “five steps” is for members to signify their intention to be bound by the provisions of a constitution in a process of formal application to membership followed by ratification, the Board has found other procedures to be sufficient evidence of the formation of the organization. Thus the Board has found that it is sufficient evidence of the organization’s formation and ratification of its constitution where the purported members of the union were named in the constitution and then subsequently signed the constitution agreeing to be bound by its terms. (*Comco Metal and Plastic Industries Ltd.*, [1979] OLRB Rep. June 498.) Similarly, while the Board has stressed the importance of the organization seeking trade union status having an identifiable set of officers as an indication of its viability (see *Service Employees Union*, *supra*), nevertheless the Board has accepted as sufficient the election of a temporary committee, even in the absence of a provision in the constitution contemplating such committee. (*Gold Crest Products Ltd.*, [1973] OLRB Rep. Aug. 436) More generally, the Board is interested in the substantial, rather than technical, compliance with the procedural steps involved in the formation of the trade union, since the purpose of its inquiry is not so much in ensuring that the precise requirements of the constitution are followed rather than ascertaining that the organization seeking trade union status is a viable one for the purpose of carrying out its obligations under the Act.

9. Although the procedure adopted by the present applicant was not one that most clearly expressed the purposes of the participants, when the evidence is considered as a whole, the Board is satisfied that the actions taken at the January 16, 1994 organizational meeting were sufficient so as to create an organization, to admit its members, and to approve its constitution. In reaching this conclusion, the Board has paid particular attention to the manifest intention of the participants, which was to create a trade union for the purpose of this application. In this respect, the Board notes that the employees attending the meeting expressly stated this to be their purpose and then unequivocally approved a constitution document in a procedure marked by a relatively high level of formality. The Board notes that the employees amended the constitution so as to be effective as of the date of their meeting, and then initialled such amendment. From these actions we infer an intention on the part of those present to be bound by the provisions of the constitution.

10. We cannot agree that this intention is defeated merely because the employees were not yet members of the organization at the time they agreed to be bound by the constitution. The evidence is clear that the employees signed membership documents, which signalled an unequivocal intention to join the organization, within minutes of their agreement to be bound by the terms of its constitution. In the Board's view, it would be an unduly technical interpretation of the events of the meeting to consider the "steps" taken by the employees as discrete stages of a procedure rather than as a single unified process. Even more tortuous would be the inference, suggested by the intervenor, that the employees had merely "approved" (step 2) rather than "ratified" (step 4) a constitution only because they had neglected to undertake the rather counter-intuitive procedure of agreeing to a document twice at the same meeting. In a context where approval of the constitution and membership in the organization occur virtually simultaneously and are performed by precisely the same participants, such a distinction is a highly artificial one. Moreover, in our view, it would inject an unnecessary level of formality into the process of self-organization were the procedure emanating from that distinction to become a mandatory step in the formation of a trade union. Instead, the Board is prepared to view the actions taken by the employees at the January 16, 1994 meeting in their totality, and is satisfied that by agreeing to be bound by the terms of the constitution, and then immediately applying for membership in that organization, the employees satisfied the Board's requirements as to the formation of the organization.

11. Finally, the Board is not prepared to conclude that the requirements of trade union status are not satisfied on the basis of the applicant's alleged failure to abide by the "quorum" requirements set out in the constitution document nor on the basis that there is no provision in the constitution for an "interim" executive. The Board notes that, unlike some constitutions that have been placed before it, the present constitution does not set out any procedure with respect to its own ratification or amendment. Furthermore, it is by no means clear that the process of adoption and ratification is either a "regular" or "special membership meeting" as contemplated in Article 7 of the applicant's constitution. Bearing this in mind, it is at the very least an arguable proposition that the participants involved in the process of the ratification of the applicant's constitution were not, in a general sense, bound by its terms or that if they were, that the meeting of January 16, 1994 was one to which the quorum requirements had no application. However, the Board declines to make any ruling in this respect, as we are satisfied that the procedures adopted by the applicant, under the circumstances at the time were in substantial compliance with the constitution. In particular, the Board notes that at the meeting, all the existing, or more precisely, soon-to-be, founding members of the organization had an opportunity to participate in its proceedings. As a result, the mischief sought to be redressed by a quorum requirement could not arise.

12. It is important to note that the Board is far less concerned with the minute issues of constitutionality of the actions of an organization seeking trade union status than with determining its organizational viability and its ability to carry out the statutory obligations placed upon trade

unions by the Act. In this respect, the Board is concerned with the constitution only as evidence of the existence of a viable organization and, therefore whether it is a trade union under the Act. (*Re C.S.A.O. National (Inc.) and Oakville Trafalgar Memorial Hospital Association*, [1972] O.R. (2d) 498.) For this reason, in *Gold Crest, supra*, the Board was satisfied as to the trade union status of an organization that had, in clear contravention of the terms of its constitution, elected an interim executive, when it was otherwise an viable organization. The Board declined to enter into an inquiry with respect to the constitutionality of the actions of the interim executive, noting that the constitutionality of the appointment process was an issue which is of concern to the membership of the trade union, not of the Board. We are in full agreement with the policy expressed in *Gold Crest, supra*, and find it of particular relevance to the present application. The present applicant has, under circumstances where only a fraction of its potential membership was present to vote, adopted the entirely reasonable procedure of deferring a full election of officers until certification. Whatever the constitutionality of that appointment process might be, we are satisfied that the appropriate officers are in place to effect the purposes of the organization which include the carrying out of a trade union's responsibilities under the Act. Accordingly, we are not persuaded that the interim basis of the appointment of the executive constitutes an impediment to the applicant's trade union status.

13. For these reasons, the Board found that the applicant is a "trade union" within the meaning of section 1(1) of the *Labour Relations Act*.

3970-93-M International Union of Bricklayers and Allied Craftsmen, Local 2, Applicant v. Dynamo Masonry Contracting Ltd., Responding Party

Abandonment - Bargaining Rights - Construction Industry - Reference - Board not persuaded that 15 month delay between no-board report and request for first contract arbitration, of itself, sufficient to warrant conclusion that union abandoned bargaining rights - Board advising Minister of Labour that union's bargaining rights not abandoned

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *G. O. Shamanski* and *R. R. Montague*.

APPEARANCES: *Danilo Buttazzoni* for the applicant; *John Locz* for the responding party.

DECISION OF THE BOARD; April 27, 1994

1. This is a reference from the Minister to the Board pursuant to section 109 of the *Labour Relations Act* regarding a request by the International Union of Bricklayers and Allied Craftsmen, Local 2 (hereinafter the "union") for first contract arbitration pursuant to section 41 of the Act. The Minister has referred the following question to the Board for its advice:

Has the union abandoned its bargaining rights?

2. At the commencement of the hearing into this matter the parties agreed to the following essential facts:

(a) On August 22, 1991 the union applied for certification in respect of

certain employees of Dynamo Masonry Contracting Ltd. (hereinafter the “employer” or the “company”).

- (b) By decision dated October 15, 1991 the Board (differently constituted) issued three certificates to the applicant in respect of (for the full bargaining unit descriptions the reader is referred to the Board’s decision of October 15, 1991 in Board File 1816-91-R):
 - (i) bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the company in the ICI sector of the construction industry in the province of Ontario;
 - (ii) bricklayers, bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the employ of the company in all sectors of the construction industry in Board area #8; and
 - (iii) construction labourers in the employ of the company in all sectors of the construction industry in Board area #8.
- (c) By letters dated October 22, November 8 and December 4, 1991 the union forwarded notices to bargain. The company failed to reply to any of these notices.
- (d) On January 31, 1992 the union applied for conciliation.
- (e) On March 27, 1992 the parties met with a conciliation officer.
- (f) By letter dated April 7, 1992 a “no-board report” was issued in respect of the two non-ICI bargaining units referred to in paragraphs (b) (ii) and (iii) above.
- (g) By letter dated July 8, 1993 the union made a request to the Minister for first agreement arbitration pursuant to section 41 of the Act.
- (h) By letter dated August 31, 1993 the employer asserted that the union had abandoned its bargaining rights and was, therefore, not entitled to request first contract arbitration. The employer requested that the Minister refer the question of whether the union had abandoned its bargaining rights to the Board pursuant to section 109(1) of the Act.
- (i) By letter dated February 14, 1994 the Minister referred the question of whether the union had abandoned its bargaining rights to this Board.

3. Apart from the facts just outlined, the parties called a number of witnesses to testify before the Board. John Locz, a representative of the employer, testified on behalf of the company. Danilo Buttazzoni and Mareo Dos Santos, representatives of the union, testified on its behalf.

4. Very little of the evidence provided by these witnesses added anything of substance to the basic facts just outlined. It is clear from that evidence, however, that the employer has generally been less than cooperative and reluctant to take any steps which might result in a collective agreement between the parties. It is also clear that the union has made numerous unsuccessful

efforts to persuade the employer to sign what the union refers to as its residential collective agreement. There is, however, a factual dispute about the timing of the communications between the parties. The employer asserts that between the issuance of the no-board report in April of 1992 and the union's request for first contract arbitration in July of 1993, the union made no efforts to contact the employer or to pursue any collective bargaining objectives. The union contests that evidence and both of its witnesses testified to meeting with Mr. Locz during the period of alleged trade union inactivity.

5. We do not find it necessary to resolve this factual disparity. Even assuming that the union witnesses are mistaken about the dates, times and locations of certain meetings on company job sites, we are not persuaded that the delay between the no-board report and the request for first contract arbitration is, of itself, sufficient to warrant a conclusion that the union has abandoned its bargaining rights. In arriving at this conclusion we have considered the cases relied upon by the union which included *John Entwistle Construction Limited*, [1979] OLRB Rep. Mar. 211; application for reconsideration dismissed [1979] OLRB Rep. Nov. 1096; application for judicial review dismissed (1980), 125 DLR (3d) 568 (Ont. Div. Ct.); *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110; *Inducon Construction (Northern) Inc.*, [1982] OLRB Rep. Mar. 390 and *The Borden Company Limited, Ingersoll, Ontario*, [1976] OLRB Rep. July 379. We have also considered other Board decisions relating to the issue of abandonment, such as *Ouellette & Rochefort Ltd.*, [1971] OLRB Rep. Apr. 218; *Twin City Plumbing and Heating*, [1982] OLRB Rep. Apr. 631 and *Lorne's Electric*, [1987] OLRB Rep. Nov. 1405.

6. A review of the Board's jurisprudence in this area indicates that in determining whether a union has abandoned its bargaining rights the Board may consider a number of factors as appropriate to the particular facts before it. Those factors have included, among others, the length of the union's inactivity as well as whether there are any extenuating circumstances to explain a union's apparent failure to assert bargaining rights.

7. In the present case the period of alleged inactivity is approximately 15 months. In performing the purely empirical exercise of comparing that period to the periods involved which resulted in findings of abandonment (e.g. over 3 years in *Twin City*; 3-1/2 years in *J.S. Mechanical*; and over 7 years in *Entwistle*, all cited above) and to the periods involved where the Board found no abandonment (e.g. 8-10 months in *Inducon*; 18 months in *Ouellette*; and 2 years in *Lorne's*, all cited above), it is clear that the period of claimed union inactivity in our case is consistent with the cases in which the Board has not been persuaded that the union has abandoned its bargaining rights.

8. There is a further factor which has led us to our conclusion in this case. The evidence was undisputed that the employer has been less than eager to participate in collective bargaining with the union. The company has taken opportunities to avoid dealing with the union and has made it quite clear that it has no desire to enter into a collective agreement. The employer's lack of cooperation has not simplified the union's task and has contributed to its difficulties in arriving at a first agreement. While the employer may have real reasons for its views, particularly in light of ongoing disputes between the union and Local 183 of the Labourers' union (some of which were adverted to in the hearing), this, of course, does not relieve an employer of its statutory obligations following certification. Further, it does not seem appropriate to us to allow the employer's conduct to contribute to a finding of abandonment in this case.

9. Our conclusion in this case should not be taken as an approval of the manner in which the union has conducted itself. We are not persuaded, however, that the union's apparent inability or disinclination to bring matters to a speedy conclusion is so extreme as to warrant a finding of

abandonment. The union will, no doubt, ultimately pay the collective bargaining price for its inaction.

10. In conclusion the Board's response to the question referred to it by the Minister is as follows:

The union has not abandoned its bargaining rights.

2348-93-G; 3808-93-G International Union of Operating Engineers, Local 793, Applicant v. Elirpa Construction and Materials Limited, Responding Party

Abandonment - Bargaining - Construction Industry - Construction Industry Grievance - Board not persuaded that period of inaction in roads sector between 1988 and 1992 sufficient to warrant finding of abandonment in that sector of bargaining rights granted in multi-sector certificate - Board setting out parties' submissions in respect of whether employer nevertheless bound by "cross-over" clause in collective agreement negotiated by accredited employer organization - Employer arguing that employer association had no right to bargain beyond sector for which it was accredited, at least for non-members - Accredited employer organization given ten working days to indicate whether it wishes to make representations in connection with "cross-over" clause issue

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Ronson* and *G. McMenemy*.

APPEARANCES: In Board File No. 2348-93-G *L. Steinberg* and *R. Kennedy* for the applicant; *C. E. Humphrey*, *A. Renton* and *M. Aprile* for the responding party.

DECISION OF THE BOARD; April 27, 1994

1. These are referrals of construction industry grievances to arbitration under section 126 of the Act. The issues underlying Board File No. 2348-93-G are two: i) has the union abandoned its bargaining rights in the road building sector, and (ii) what is the effect of what is known as a "cross-over clause" on an employer who is not a member of the accredited employer organization who negotiated it.

2. By decision of the Board, differently constituted, Board File No. 3808-93-G was consolidated with this matter as similar or related issues are involved. The evidence and argument in File No. 2348-93-G on which this decision is based were heard before that consolidation order was made. In due course the parties will have an opportunity to address any unresolved issues in File No. 3830-93-G.

3. The applicant, ("the union" or "Local 793"), obtained bargaining rights for employees of the responding party ("Elirpa") on January 31, 1986 in the industrial, commercial and institutional ("ICI") sector and all other sectors of the construction industry in Board Area No. 8. The employer says the union has since abandoned its rights in the road sector through disuse. The union says it has not. In any event of the abandonment question, the union says the employer must pay union rates for roads work because of a cross-over clause in a sewers and watermain collective agreement to which the parties are bound. The employer agrees it is bound to that collective agreement in the sewers and watermains sector, but resists being bound in the roads sector. This is

because Elirpa maintains that the accredited employer association which negotiated the cross-over clause had no right to bargain beyond the sector for which it was accredited, at least for non-members. We will deal with the abandonment issue first.

I

4. Has the union abandoned its rights in the road building sector?

5. After the union was certified, as set out above, the parties unsuccessfully attempted to negotiate a collective agreement for the roads sector in Board Area 8 in early 1986. (The evidence was unclear as to which of the employer's 1986 projects was the certification site.) There was one brief meeting where the union presented a collective agreement which the company did not sign. Conciliation ensued and a "no board report" was issued on June 23, 1986. There were two contacts by the union after that, one to notify the employer of what the "no board" meant and the other a "drop in" visit by two business agents, at which the engineer on site said he had no authority to talk to the union. Vito Montagnese, a union business agent, put the last of these meetings as likely in early 1987.

6. In 1987, Elirpa had only one roads project, lasting three to four months, worth \$800,000. The union says it did not approach the employer in regards to that project because Elirpa had made it clear there was "no way" it was going to sign a collective agreement.

7. In 1988, Elirpa had two good sized contracts from the Region of Durham. The union set up a picket line at a site on Liverpool Road for two days. This did not result in a meeting or a collective agreement. The union attributes this to the poor configuration of the site for effective picketing, and notes that the company did not formally challenge the union's right to be there. However, Mr. Montagnese did acknowledge that Mike Aprile, one of Elirpa's principals, told him individually that the union had no right to be there. After the Liverpool road job, there was one more job in 1988, which overlapped with the Liverpool Road job for about one month on which the union took no action.

8. From the summer of 1988, to the spring of 1992, there is no evidence that the union contacted the employer concerning its bargaining rights on any roads sector job. Elirpa had six roads jobs during that period, of varying sizes. Of two jobs that occurred during that time, the union says that a significant portion was contracted to union contractors, and thus did not raise significant issues for them. Richard Kennedy, the Local President, was aware of two jobs which they decided not to picket, for various reasons including difficulty with being effective and safety. During this time, the company never called the union for operators or made any remittances of any kind to them. Elirpa was operating openly, and several of the jobs were publicly tendered and awarded.

9. In 1989 the Board, differently constituted, issued its decision in an application for accreditation in the sewers and watermain sector. See *Metropolitan Toronto Sewer and Watermain Contractors Association*, [1989] OLRB Rep. Dec. 1226. At paragraph 14 of that decision the Board recites the history of the issue of whether Elirpa should be on final Schedule "E", which defines the composition of the unit of employers to which the double majority test of what is now section 129(2) is applied. After the Board issued the accreditation certificates in November 1989 without the Elirpa issue being resolved the matter was listed for hearing. The parties then agreed that Elirpa should be added to the list of employers in the accreditation decision, over the initial opposition of the employer. The union's bargaining rights which were recognized in that decision derive from the same multi-sector certificate as the disputed roads sector bargaining rights.

10. In April, 1992, the union required the removal of what it believed, on the basis of its operator's statements, to be Elirpa's backhoe from a site. The union's evidence was that Elirpa was doing culverts for a unionized contractor, Crupi. Although the company denies it had equipment on this site, the union queries why an operator would make up its name.

11. In the spring and summer of 1993, Elirpa had a couple of road projects which were of relatively short duration. These included two occasions when the union found operators working for Elirpa and had them removed. Although the union says these incidents were clear assertions of its bargaining rights with Elirpa, the company observes that Local 793 treated this equipment in the way it would treat any non-union contractor's equipment. They arranged for its replacement with someone in contractual relations with the union. They did not contact the company at all, to suggest they had an obligation to bargain, or for any other reason. Thus, Elirpa argues that this evidence is consistent with the union's having abandoned its rights before this time.

12. In 1993, Elirpa did two jobs of two months duration in East Gwillimbury, before the Valley Farm Project which was the site of the immediate dispute before us. This site was also visible to the public, and the union did not approach Elirpa about it.

13. The grievance in Board File No. 2348-93-G was filed on September 21, 1993, alleging a breach of the sewer and watermain agreement in that Elirpa was not using Local 793 men or making the remittances required under the collective agreement. Union representatives went to the site and asked the company if it wanted to enter into a collective agreement. When it declined, picketing commenced and continued from September 22 through 24.

14. The picket line effectively stopped work on the project and Elirpa agreed to meet. The meeting on September 24 lasted about 20 minutes. At the meeting, the union presented the low-rise and independent road builders agreement for the employer's consideration. Elirpa agreed not to perform work at the project while it reviewed these agreements. Montagnese testified no one at that meeting said the union did not have bargaining rights. On September 28, 1993, Mike Aprile, one of Elirpa's principals, met again with Montagnese and informed the union that it would not enter into a collective agreement with it. There was no challenge to the union's bargaining rights or right to picket at that meeting either. Union counsel underlines that the employer did not challenge the union's right to picket up to and including the meetings to consider the collective agreement the union was proposing. The union says this was bargaining, i.e. trying to persuade the company to sign a collective agreement, between September 24 and 28, 1993, and that it constitutes a waiver by the company of any earlier abandonment. The union was asked to take the picket line down and did not.

15. Mike Aprile testified that he had not had legal advice at that point, and did not clearly understand his legal position. He understood that the union wanted him to sign a collective agreement, however, and he was desirous of resolving the situation created by the pickets. That is why he met with the union. Aprile said he kept saying to the union, "Why are you bothering us when you have not bothered us for so long," and that the union answered because they had a "no Board". He agreed that the union was relying on the "no Board" to try to get the company to sign a collective agreement.

16. The company had not performed work on the project in question on September 29, 30, and October 1, 1993. On about October 4, Elirpa attempted to resume work on the site, and was again met with picketing. An application was made to the Board in respect of the picketing and what the respondent considered an illegal strike. As a result of the settlement of that application, the matter of the abandonment of the union's bargaining rights in the roads sector is raised in the context of this grievance.

17. Union counsel says there should be no doubt that the bargaining rights were live through the no-board and the subsequent meetings and up to the 1988 picketing. Although not successful, counsel stresses that the 1988 line is a clear assertion of the union's bargaining rights. Counsel queries whether it should matter that the picket line was unsuccessful, or that it only lasted two days. Counsel asserts that the test for abandonment should not be the quality or efficacy of the union's use of its bargaining rights, but rather whether they gave up their rights by inaction. The union was not required to engage in an academic exercise to put up picket lines where it knew they would not be effective. Counsel refers to *Traugott Construction*, [1981] OLRB Rep. Nov. 1680 at para. 26 to support its argument that the steps taken in September by the employer to negotiate constitute acceptance of the union's right to picket and the fact that it had bargaining rights. Without the section 137 application, there would have been no doubt that what happened from Sept. 24 to Sept. 28 was collective bargaining.

18. Employer counsel said that the appropriate test on abandonment is to answer the question: What would a reasonable person observing the union's behaviour conclude about the union's rights. It is an objective test, not an inquiry into the subjective intention of a party.

19. As to the suggestion that by talking to the union in the face of a picket line that had stopped its operation the employer waived its right to argue abandonment, counsel answers that intention is required for waiver, and the employer did not know any such thing was at stake. How could it waive? It makes no sense to say that by engaging in a very aggressive illegal strike you can force someone to talk to you and create a waiver of any abandonment argument.

20. The evidence overall, in employer counsel's submission, shows that the union did basically nothing to assert its bargaining rights. If a collective agreement could not be reached without effort, they were not going to bother. Even in 1988, observes counsel, when they put up a picket line, there is no evidence of any attempt to talk. Then they disappeared for five years. Not one word to the employer between June 1988 to September, 1993, while Elirpa is going about its business in a highly public way. Counsel says it is just not credible that the union did not know of Elirpa's jobs. The union acknowledged it knew the Daily Commercial News was a good source for the industry; Aprile says the jobs Elirpa had were reported there.

21. Employer counsel argues that the evidence is clear that Elirpa was using subcontractors in contractual relations with the union; it must have been aware of its presence on these jobs. Counsel says there is really no explanation for the lack of activity. They say it was not convenient to picket, but there is no explanation for the lack of action in the many other ways the union could have asserted its rights. As to 1988, employer counsel says Montagnese acknowledged that Aprile had told him the union had no right to be on the picket line, and besides, the five years since 1988 is enough time to constitute abandonment.

22. Company counsel characterizes the 1993 picketing as an aggressive attempt at recognition picketing. The union realized it had let the rights lapse and tried to use overwhelming force to get Elirpa to recognize them again, submits counsel.

23. In reply the union says that intention is not necessary for waiver to have occurred if a party acts inconsistently with rights it may have. As well, counsel objects to what he termed insinuations about violent or aggressive behaviour on the 1993 picket line when there has been no finding of illegal behaviour, and the union denies any illegal behaviour.

24. We have carefully considered the evidence and argument on the abandonment issue. The evidence discloses a situation where the union pursued its bargaining rights to the "no-Board" stage and then considered negotiations at an impasse as indicated by its picketing activity in 1988.

It is clear that both then and in 1993 Mr. Aprile understood the union to be relying on its certificate and the valid “no-Board”. We are not persuaded that the period of inaction in the roads sector between 1988 and 1992 is sufficient to warrant a finding of abandonment in that sector of the rights granted by the multi-sector certificate.

25. The state of affairs by 1988 was that Mr. Aprile had made it clear he was not interested in signing a collective agreement with terms and rates similar to the collective agreements that the union has entered into with other employers. We are of the view that both parties’ expectations would reasonably have been that the union would continue to look for the signing of a standard agreement, given the widespread concern for a “level playing field” in the unionized construction industry on the part of both employers and unions. There were three road building seasons, 1989 to 1991, in which the union did not do anything visible to try to get such a roads sector collective agreement signed. The union has explained the practical reasons for not picketing in this period. Further, it was enforcing the rights flowing from its multi-sector certificate in 1989 as evidenced by the contest over Elirpa’s status set out in the Board’s 1989 accreditation decision in the sewers and watermains sector, which the union views as giving it rights to enforce union rates in the roads sector as well. By 1992 it was asserting its rights more visibly in the roads sector again, albeit in an ambiguous manner. We are not satisfied that an objective observer of the facts taken as a whole would conclude that the union had abandoned its rights. This is not to say that the union could not have done more. It clearly could have. Although the idea that picketing is the only effective way to enforce bargaining rights, in circumstances like the above, may have considerable currency in the construction industry, there are many other ways to proceed, and legislative provisions which the union could have used.

26. The authorities referred to by the employer on the question of abandonment include *J. S. Mechanical*, [1979] OLRB Rep. Feb. 110 which involved a relationship where a collective agreement had been negotiated. The Board found that three and a half years of failure to act on the renewal of that collective agreement, including a failure to pursue the matter to the “no-Board” stage amounted to a withdrawal from the relationship. In *R. Reusse Co. Ltd.*, [1988] OLRB Rep. May 523, the period of inactivity was over twenty years after the conclusion of a collective agreement, fifteen of which had elapsed prior to the onset of provincial bargaining. In *Ameri-Cana Motel Limited*, [1989] OLRB Rep. Oct. 1009 a period of approximately five years of total inaction after certification lead to a finding of abandonment. Abandonment is in large part a factual call. We are of the view that the facts of those cases are distinguishable, on either or both of the length of time of inactivity and the fact that the bargaining rights here derive from a multi-sectoral certificate. The bargaining rights flowing from that certificate were also being pursued in the sewers and watermains sector.

27. Thus, we have concluded that the union has not abandoned its bargaining rights in the roads sector.

II

28. Is the employer bound by the cross-over clause?

29. The parties became bound by the collective agreement between the Metropolitan Toronto Sewer and Watermain Contractors Association and the union (“the sewer and watermain agreement”) following a 1989 accreditation order. See *Metropolitan Toronto Sewer and Watermain Contractors Association*, [1989] OLRB Rep. Dec. 1226. Elirpa is not a member of the accredited association and disputes the union’s claim that it is bound by the “cross over” clause in the sewer and watermain agreement to pay union rates in the roads sector, whether or not the union has abandoned its rights in that sector. The employer takes the position that the authority given to the

accredited association is only to bargain on behalf of Elirpa within the sector and geographical area for which it was granted accreditation. Company counsel says that the association simply does not have the authority to affect his client's rights outside that sector.

30. The Metropolitan Toronto Sewer and Watermain Contractors Association was given notice in Board File No. 3808-93-G by the applicant of the fact that it sought to add it as a party, but the Association has not sought to intervene. In Board File No. 2348-93-G, although the responding party listed the Association as an affected party, it now appears that the Operating Engineers employer bargaining agency designated in the ICI sector was given notice by the Board instead, through inadvertence. In light of the consolidation of these matters, it appears appropriate to reserve on the cross-over clause issue and hear from the Toronto Sewer and Watermain Association as to whether it has any submissions to make on the applicant's request for it to be added as a party, and whether it has anything it wishes to add to the facts and submissions of the parties on the cross-over clause issue which are set out below.

31. The parties are agreed that Elirpa is bound by the sewer and watermain agreement in the sewer and watermain sector. Since the accreditation order in 1989, Elirpa has only performed two jobs in the sewers and watermains sector, one for \$18,000, considered a very small job, and the one which attracted the current grievance, for \$184,940. It has been more active in road building. The union argues that whether or not it has abandoned its rights in the road building sector, section 15.5 of the sewer and watermain agreement requires Elirpa to apply the terms of the roads agreement. Section 15.5 provides as follows:

15.5 If an Employer covered by this Agreement engages in work other than Sewer and Watermain construction, and such other work comes within the purview of the existing Collective Agreement between the Union and The Metropolitan Toronto Road Builders' Association, the rates of pay and conditions of work of that Agreement shall apply. Similarly, if an Employer covered by this Agreement engages in work generally recognized as heavy construction (overpasses, bridges, etc.), the rates and conditions prevailing in the Collective Agreement between the Union and the Operating Engineers Employer Bargaining Agency shall apply. It is further recognized that on all subway construction for the T.T.C., GO Transit or other public transportation systems, the rates and conditions of the Agreement between the Union and the Operating Engineers Employer Bargaining Agency shall apply.

32. There have been two collective agreements since the 1989 accreditation decision; language identical or similar to the above was to be found in both those agreements as well as in agreements between Local 793 and the Association which predated accreditation. Similar cross-over wording is found in the existing road building agreements, to sewer and watermain work, as well as to other sectors. Richard Kennedy, President of Local 793, testified that the purpose of such a clause is to respond to the situation that when doing road or sewer and watermain work, it is often hard to distinguish where one starts and the other leaves off. The employer has the advantage of having only one collective agreement to cover both kinds of work. Sometimes it is the same crew which does both kinds of work.

33. In argument on the effect of the cross-over clause, the union notes that it is a matter of record that Elirpa is a named employer in the accreditation decision, as the union had pre-existing bargaining rights. Elirpa was on the list from which the Board determined that there was the

appropriate level of support for the Association to obtain accreditation. The union argues that once the Association has the authority to bargain on behalf of Elirpa, whatever it negotiates binds him. Counsel analogizes this to the fact that whatever collective agreement is negotiated by a union as exclusive bargaining agent binds all employees in the bargaining unit, whether or not they are members of the union, and whether or not they agree with the result. Counsel says it is trite law to say that parties can negotiate beyond the bounds of the certificate, including for groups excluded by the certificate; the certificate is spent once the collective agreement is negotiated. Counsel says that there is no reason apparent from the statute to treat the accredited relationship any differently.

34. Further, counsel says that the cross-over clause makes good labour relations sense because it is so hard in some circumstances to distinguish road building from sewer and watermain work, which are very often done together. Since the union represents people doing both kinds of work, it is sensible to avoid disputes over which it is, which the cross-over clause achieves. As well, argues the union, it makes sense for employers because they do not have to spend the time to distinguish whether it is roads or sewer work and they do not have to maintain two crews.

35. Counsel referred to *Frank Plastina Investments Limited*, [1986] OLRB Rep June 720, and *CDC Contracting*, [1982] OLRB Rep. Nov. 1589, as Board cases which indicate the importance of crossover clauses in the construction industry.

36. The Union also referred to *Re. International Association of Heat and Frost Insulators*, 103 DLR (4th) 401 (N.S.C.A.) There the employer was a member of the association with rights to bargain under the equivalent Nova Scotia statutory provisions. Counsel refers to pages 403 and 405, and says the problem arose because the insulators were not so designated, and the question was whether it was bound when it had not specifically assumed those obligations. The union's fundamental argument is that where the Act speaks in such broad terms without any restrictions on what kind of agreement can be reached, it would be inconsistent with the scheme of the Act to accept the employer's proposition.

37. Counsel reviewed the statutory scheme from sections 127 through 134 and said that the wording of section 131 (2) is key as it says the employers are bound as if the agreement was made by them. Union counsel says this prevents the Board from finding that certain terms of the collective agreement do not bind Elirpa. Counsel observes that one of the reasons for the whole scheme is to avoid whipsawing tactics in dealing with employers who are competitors. They all get the same deal, members or not, in counsel's submission. This is the purpose of section 133 which prohibits individual bargaining. If Elirpa does not feel that the Association is representing it properly it can apply under section 134.

38. Counsel says the effect of the cross-over clause is to incorporate the road builders collective agreement by reference into the sewer and watermain agreement.

39. Employer counsel, by contrast, underlines the very specific scope of the bargaining rights given to the Association. On p. 1241 of the 1989 accreditation decision, cited above, at B(v), specific things are excluded from the bargaining rights, including the agreement with the Metropolitan Toronto Road Builders Association. The company's position is that whatever the Association may be able to negotiate on behalf of its members, when it comes to those parties who are bound by operation of law, the bargaining unit description sets the limits of their jurisdiction. There are no limits on the union's proposition that as soon as you get accredited, even for a very narrow area, you can bargain whatever you want. Employer counsel says the fundamental flaw with the analogy to certification which underlies the union's argument is that there is a big difference in the situation when a union bargains with an employer compared to when it bargains with an associa-

tion. The employer has all the rights it can give up; if that employer want to recognize the union for more than the union has authority for, the employer has the authority to do that. This is a fundamentally different situation than with accreditation. All the association got was the right to negotiate for a sector and a geographic area; all the other rights still belong to the individual employer. It is the employer's submission that accreditation does not take away the employer's right to bargain on his own behalf for anything other than the sectoral bargaining unit for which the Association is accredited. There is simply no mechanism, says counsel, by which the association can expand on the limited authority it has.

40. Employer counsel refers to *Beckett Elevator Company Limited*, [1982] OLRB Rep. Sept. 1244. Acknowledging that the decision refers to the ICI sector, counsel says that it stands for the proposition that you cannot expand the area of authority granted by the Act. In other words, you can not bargain yourself more authority than the statute gives you. The employer refers to section 128(2) which defines what the unit of employers is; it is employers within a sector. The whole scheme has to be read subject to the particular geographic area and sector for which the rights are granted in the first place. The accredited Association only has the rights to which the Act speaks, not all the rights of all the employers bound by operation of law.

41. Counsel for Elirpa submits that problems are created in coherently applying the scheme if the union is right that unlimited bargaining rights flow with an accreditation order. He turns to section 133 which prohibits individual bargaining, and queries how that fits with unlimited scope for bargaining in the association. Implicit in the scheme is that the accredited bargaining agent is only going to be bargaining in the sector for which it is accredited. Counsel asks if 133(1) means that the employer is prohibited from negotiating what he pays for road building or TTC work? Once you move away from the sector for which the association is accredited, how does 133(1) work? Or what about 133(2)? Counsel asks if this means Elirpa cannot work on roads if there is a strike in the sewers and watermains sector?

42. Employer counsel says that the Association has two roles; one as a statutorily accredited agency, and the other as a consensual association of its members. It bargained this collective agreement in both roles.

43. Employer counsel says that the Association can do whatever it wants on behalf of its own members. However, because accreditation is an extraordinary mechanism which takes away bargaining rights that belong to the employer, but only in a specific sector, it should be very strictly and narrowly construed for non-members. Counsel for Elirpa urges the ICI model; a party may become bound to the provincial agreement in the ICI sector, but not in other sectors. The Association when operating within the scope of certification is acting as accredited employer, but outside the scope, it is not. In ICI, one would look at them almost as two collective agreements.

44. Employer counsel cites *Sandercock Construction*, [1984] OLRB Rep. April 653 for the proposition that the sewer and watermain association has no right to affect what Elirpa has to pay for road building. In answering the union's criticism that what the company is proposing would lead to separate deals for members and non-members, counsel says that the construction industry makes deals for people all the time. If a company happens not to be bound by the sewer and watermain agreement, it can be doing the same work under another collective agreement like the independent road builders agreement. To prevent this kind of separate deal, there would have to be accreditation across several sectors.

45. The Board should read the words "collective agreement within the sector and geographic area" into section 131(2) as the Act contemplates clean edges, in the employer's submis-

sion. Once you break that down, there are no limits. But the limits are there on the authority they had in the first place. They do not have the rest to give away.

46. In reply, counsel for the union says that there is a problem with the clear boundaries theme in the employer's argument. It breaks down completely the moment he says that the Association can do this kind of bargaining for its members. The union says its point is that to the extent that the scheme needs clean lines, the clean lines should be that there are no special provisions for members as opposed to non-members.

47. Union counsel rejects the employer's characterization of the accreditation scheme as extraordinary, saying it is no more extraordinary than certification. He maintains that the analogy to certification is still valid. The scope of the unit in both situations is an administrative convenience. There is nothing in the accreditation provisions whatsoever that limits the authority of the association and the union on how far they can go.

48. Counsel distinguishes *Beckett Elevator*, cited above, by saying that the Board focused on the words of what is now section 145(a) "but only", whereas there is no similar limiting language in section 130 at all. Once an employer is subject to the accreditation order, it is bound by the collective agreement without limitation. Counsel says there is no justification for reading in any limiting language where there is none. There is no damage to the structure where the members can exceed the bounds in any event.

49. Responding to employer counsel's concerns about the coherent application of the scheme, union counsel says that if there is no accreditation in roads, jurisdictional conflict may be caused, but the parties are not thrown into involuntary breach. Section 133(2) does not necessarily mean that the employer cannot do road work because of the operation of 15.5. None of the potential problems with cross over clauses should concern the Board with the application of section 15.5 in the union's submissions. If employer counsel has a valid point at all, it falls apart with his concession that members may bind themselves outside the accredited sector.

50. As to the ICI analogy, union counsel says it is far more complicated, because the parties are designated on both sides.

51. The employer did not dispute the union's assertion that the grievance should be allowed at least in respect of the sewers and watermains sector, and we so declare. We will remain seized if the parties are unable to work out the results which should flow from that declaration.

52. This decision will be sent to the Toronto Sewer and Watermain Association who will have ten working days from its date to indicate whether they wish to add anything to the facts and arguments as to the effect of the cross-over clause set out above, and as to whether they have any position on the applicant's request to add them as a party in Board File No. 3808-93-G. If we do not hear from them in that time period, we will proceed to determine the cross-over issue on the basis of the above facts and submissions.

4224-93-JD Board of Governors of Exhibition Place, Applicant v. International Alliance Theatrical Stage Employees, Local 58 (I.A.T.S.E.), Labourers' International Union of North America, Local 506 (L.I.U.N.A.), Klanside Inc. and Elite Show Services, Responding Parties

Jurisdictional Dispute - IATSE and Labourers' union disputing assignment of work in connection with erection, setting in place and dismantling of risers on stage for certain shows at Canadian National Exhibition - Board declaring that work in dispute should have been assigned to IATSE members and making order binding parties for future jobs involving the disputed work pursuant to section 93(2) of the Act

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *F. B. Reaume* and *H. Kobryn*.

APPEARANCES: *Carl Peterson, Tom Ervin, Ron Mills and Peter Scarsella* for the applicant; *T.W. Pratt* for I.A.T.S.E.; *John Monger, George Dixon and Bob Maskey* for L.I.U.N.A.; *Kathy O'Hara and Harold O'Hara* for Klanside Inc. and Elite Show Services.

DECISION OF THE BOARD; April 19, 1994

1. This is a complaint concerning an assignment of work; that is, a jurisdictional dispute, brought to the Board under section 93 of the *Labour Relations Act*.

2. All parties filed written materials with respect to the complaint, and attended at the consultation scheduled by the Board on April 8, 1994. No party made any request or suggestion that the Board conduct a formal hearing, or that the Board hear evidence with respect to any matter in issue. Upon considering the materials filed, and the representations of the parties at the consultation on April 8, 1994, the Board concluded that the complaint could properly be disposed of on the basis of those materials and representations. The Board therefore ruled, orally, that:

- (a) there was no issue with respect to which the Board either found it necessary to or wished to hear evidence;
- (b) the Board would dispose of the complaint on the basis of the materials and representations before the Board; and
- (c) the complaint should be allowed and the relief requested should be granted.

3. There were some differences in the description of the work in dispute contained in the materials filed by the parties. At the consultation, however, the parties agreed that the work in dispute in this proceeding is:

the erection and setting in place of flats and risers on the stage, and the dismantling of the same, for the Toronto Bridal Show and the National Bridal Show at the Queen Elizabeth Exhibition Hall at Exhibition Place.

4. In complaints concerning work assignments, the Board generally considers the factors first set out in *Canada Millwrights Ltd.*, [1967] OLRB Rep. May 195. These factors have since been summarized in the jurisprudence as follows:

- collective bargaining relationships
- skill and training

- economy and efficiency
- employer practice and preference
- area practice

As the decided cases demonstrate, this is not an exhaustive list. It is neither possible to make an exhaustive list, nor appropriate to mechanically apply some formula or list of factors to a jurisdictional dispute complaint. Instead, the Board considers whatever factors are relevant to the particular dispute before it, which may include some or all of the factors listed above, or others which are not. Further, some of the five factors listed above will be of little assistance in any given case. In recent years, for example, the jurisdiction asserted by various trade unions in their collective agreements (or constitutions) have become so broad that little weight can be given to some of them. In cases in which the competing claims are based on asserted craft or trade jurisdictions, the Board has recognized that collective bargaining relationships may not, by themselves, be determinative of a jurisdictional dispute complaint. Consequently, while a trade union which has no collective agreement with the employer which assigned the work in dispute may have a difficult time in having the assignment altered, or of having the assignment confirmed if it did receive the assignment, a trade union which has a collective bargaining relationship with the employer which made the assignment will not necessarily be successful in fending off a claim for such work by a trade union which does not have an applicable collective bargaining relationship with that employer (see, for example, *Brunswick Drywall Limited*, [1982] OLRB Rep. Aug. 1143, *Pigott Construction Limited*, [1992] OLRB Rep. June 748 (“Pigott II”). On the other hand, a single factor may be determinative of a jurisdictional dispute complaint. Work jurisdiction agreements provide one example (see *Pigott construction Limited*, *supra*). In some cases, area practice will be determinative (*Ilena Construction Company Limited*, [1974] OLRB Rep. Nov. 775, *Acco Canadian Material Handling*, [1992] OLRB Rep. May 537). In other cases the Board has awarded the work in dispute to the trade union which that factor did not favour (see, for example, *Simcoe Mechanical Contracting Ltd.*, [1982] OLRB Rep. Sept. 1352, *K-Line and Maintenance & Construction Limited*, [1979] OLRB Rep. Dec. 1185).

5. In this case, the Board of Governors of Exhibition Place (“Exhibition Place”) licensed the Queen Elizabeth Exhibition Hall to Klanside Inc. for the purpose of holding the Toronto Bridal Show and the National Bridal Show, from October 1, 1993, to October 3, 1993 and from February 4, 1994 to February 6, 1994 respectively.

6. Included in the terms and conditions contained in the licensed agreements entered into between Exhibition Place and Klanside Inc. in that respect, governing the use of the Queen Elizabeth Exhibition Hall, is that Klanside Inc.:

- 1) require that any work performed by or on behalf of the Licensee which is within the trade jurisdiction of the Labourers’ International Union of North America (“the Labourers’ Union”) is performed by employees of an employer who is bound to a collective agreement with Local 506 of the Labourers’ Union, including:
 - material handling;
 - cleaning;
 - erection, dismantling, decorating and setting up of trade and consumer shows, exhibits and displays and all other related traditional work within the Labourers’ Union’s jurisdiction.
- ii) abide by any other local union agreements in existence between the unions and The Board of governors of Exhibition Place;

7. Through some arrangement between them, Elite Show Services actually performed the work in dispute for Klanside Inc.

8. One of the "local union agreements" by which Exhibition Place is bound is with the International Alliance Theatrical Stage Employees, Local 58. It provides that:

- 26.1 The Employer agrees that sceneries, properties set pieces and all other effects as shall be used in the various productions and attractions playing the Canadian National Exhibition and Exhibition Place, shall be constructed by men supplied by a Stagehands Local of the International Alliance of Theatrical Stage employees and Moving Picture Machines Operators of the United States and Canada.

The collective agreement between Exhibition Place and the Labourers' International Union of North America, Local 506 ("Labourers, Local 506") referred to in the License Agreement provides that:

- 2:01 The employer recognizes the Labourers' International Union of North America, Local #506 as the Bargaining Agent for all employees of the employer working at Exhibition Place, in Metropolitan Toronto, Ontario who are employed in classifications as set out in Appendix "A" or "B" and whose work duties consist wholly or in part of the work duties described therein, save and except non-working foreman and persons above the rank of non-working foremen, office and sales staff.

Appendix "A" to that collective agreement provides that:

APPENDIX "A"

Forming part of a Collective Agreement between the Board of governors of Exhibition Place, and the Labourers' International Union of North America, Local #506.

Work Jurisdiction and Wages

Work jurisdiction - All work performed directly by the Employer, including but not limited within the Operations Division.

- 1) the tending or assisting of all tradesmen;
- 2) pick-up and delivery of all seating, furniture and other materials when and where a tractor, trailer or fork lift is employed;
- 3) handle and provide required assistance in installation of railings, fences, gates, barriers, tents and collapsible structures, bleachers, benches, ramps and docking ramps;
- 4) operation of all equipment including fork lifts, tractors and truck driving related to labourer's work;
- 5) minor repairs to doors, crashbars and carpeting, removal and installation of all floor and ceiling tile;
- 6) clearing all roofs and eaves of debris and all walkways, ramps door egresses, fire hydrants and catch basin areas of snow;
- 7) erection, moving and dismantling of all scaffolding;
- 8) all labour related maintenance of all inside and outside areas including installation of signs, flags, glass and mirrors;
- 9) recording of work time and accounts;

- 10) all related operations not listed above.

	<u>May 1, 1991</u>	<u>May 1, 1992</u>
LABOURER	\$20.17	\$21.04
ELECTRICAL HELPER	10.74	11.15
STUDENT RATE	9.40	9.40

- 11) Provide for material handling and maintenance of rental department material and equipment excluding office furniture, bleachers, staging, platforms, barriers, ticket boxes and turnstiles.

9. A Letter of Understanding regarding leases attached to that collective agreement provides for a policy memorandum which is to apply to all lease agreements as follows:

APPENDIX I

MEMORANDUM

TO: All General Managers, Exhibition Place

FROM: Peter Moore, Chief General Manager

DATE: September 30, 1991

SUBJECT: Use of Labourers' Union During Trade Shows

This will confirm the policy with respect to the use of members of the Labourers' International Union of North America Local 506 for trade and consumer shows at Exhibition Place.

It is the general policy of the Board of Governors of Exhibition Place that we operate as a unionized, Labourers' Union trade show site. Please therefore ensure that our Trade show leases provide that any work performed by or on behalf of the lessee coming within the jurisdiction of the Labourers' Union shall be performed by companies bound to a collective bargaining agreement with Labourers, Local 506.

For the purpose of clarity the following work, but not limited to the following, comes within the jurisdiction of Local 506:

- all material handling;
- cleaning;
- erection, dismantling, decorating and setting up of trade and consumer shows, exhibits and displays and all related traditional work within the Union's jurisdiction.

Please take the appropriate steps to ensure that this policy is followed.

Chief General Manager

10. Neither Klanside Inc. nor Elite Show Services has a direct collective bargaining relationship with I.A.T.S.E, Local 58. Elite Show Services is bound to a collective agreement with Labourers, Local 506 which, in Appendix "A" describes that trade union's work jurisdiction as follows:

APPENDIX "A"WORK JURISDICTION - ASSIGNMENT OF WORK

The Employer acknowledges and agrees that the hereinafter described work is within the exclusive jurisdiction of the Union notwithstanding the claims of any other Trade Union.

The work involved in the Erection of tubular metal or any other type of scaffolding.

The Erection and dismantling of all back walls, booths, or any type of structure used for Exhibit and display purposes, assisting Tradesman in the erection of displays, including the handling and distribution of all materials whatsoever whether or not the same are to be reused again in part or in whole, all work in connection with the installation and removal of draping, rugs, drapes, furniture and accessories and such other similar or other materials used in connection with floor coverings. The operation of fork lift or other similar mechanical devices used in the performances of the Employers operations. It is agreed that in performing any of the said work as described above, the Union members may use such tools and equipment owned by the Employer or otherwise notwithstanding any claims to the contrary by any other Trade Union.

The letter of understanding dated the 29th of February 1980 will form part of this Agreement.

11. In this case, the Board was satisfied that the License Agreements between Exhibition Place and Klanside Inc. obliged Klanside to abide by the collective agreement between Exhibition Place and the I.A.T.S.E., Local 58 as though it was a party to that collective agreement. Elite Show Services came under the same obligation through Klanside Inc. Klanside Inc. could not avoid the restrictions or obligations under the License Agreements by having the work in dispute done by or through another entity. Consequently, although not a party to it, Elite Show Services was obliged to comply with the collective agreement between Exhibition Place and the I.A.T.S.E., Local 58 for purposes of the Bridal Shows in October, 1993 and February, 1994.

12. In reviewing the collective agreements of the two trade unions, the Board was satisfied that the work in dispute in this case falls within the work jurisdiction claimed by the I.A.T.S.E., Local 58 and not within the work jurisdiction claim by Labourers, Local 506. Although the Bridal Shows are a kind of consumer show, there is a theatrical element to them which distinguishes them from consumer shows like Home and Auto Shows. The I.A.T.S.E., Local 58 has historically exercised work jurisdiction over props and scenery, whether movable or not, associated with such productions. The Board was satisfied that the collective agreement factor strongly favour the I.A.T.S.E., Local 58, particularly in light of its inherent jurisdictional claim.

13. The work in dispute in this case has been a source of conflict between the two trade unions for some time. The "employer practice" materials filed with the Board in that respect, favoured the Labourers, Local 506, but in the circumstances, only slightly in our view.

14. The factor of economy and efficiency also favoured the jurisdiction claim asserted by the Labourers, Local 506, but again only slightly.

15. The remaining factors were neutral.

16. The Board was satisfied that the I.A.T.S.E., Local 58's inherent jurisdictional claim, and the collective agreement factor outweighed the employer practice, and the economy and efficiency factors which favoured the Labourers, Local 506. In the Board's view, it would take a clear trade agreement, or compelling contrary economy and efficiency, or evidence of a well-defined and virtually invariable area or employer practice to cause the Board to conclude that work in dispute should not be awarded to a party which has a superior inherent jurisdictional and collective

bargaining claim. In the result, in the circumstances of this case, the Board was satisfied that the I.A.T.S.E., Local 58's claim to the work in dispute should prevail.

17. Having regard to the materials before the Board and the representations of the parties, the Board also found it appropriate to make an order binding on the parties for future jobs involving the work in dispute, pursuant to section 93(2) of the Act.

18. In the result, the Board:

- (a) declares that the work in dispute; namely, the erection and setting in place of flats and risers on the stage, and the dismantling of the same, the Betrothal Bridal Show and the National Bridal Show at the Queen Elizabeth Exhibition Hall at Exhibition Place, is properly within the jurisdiction of the International Alliance Theatrical Stage Employees, Local 58;
 - (b) declares that the said work in dispute should have been assigned exclusively to members of the International Alliance Theatrical Stage Employees, Local 58; and
 - (c) directs that Klanside Inc. and Elite Show Services assign the said work in dispute to members of the International Alliance Theatrical Stage Employees, Local 58 at future Bridal Shows which they or either of them may undertake in the future.
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2029-91-G Labourers' International Union of North America, Local 1036 and Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Ellis-Don Limited**, Responding Party

Construction Industry - Construction Industry Grievance - Damages - Remedies - Board earlier finding employer in violation of collective agreement in failing to subcontract certain work to company in contractual relations with Labourers' union - Parties failing to agree on whether damages owing - Board not accepting employer's assertion that, in order to prove entitlement to damages, union must prove that employer or union subcontractor had same equipment, expertise and supervisory capacity actually supplied by subcontractor used by employer - Union here showing that it had members available to perform contracted work and that it was within capability of union contractors or of the employer to perform work described in contract documents - Board satisfied that union proving its entitlement to compensation

BEFORE: *S. Liang*, Vice-Chair, and Board Members *F. B. Reaume* and *J. Redshaw*.

APPEARANCES: *S. B. D. Wahl* and *William Suppa* for the applicant; *Walter Thornton* and *P. Richer* for the responding party.

DECISION OF S. LIANG, VICE-CHAIR AND BOARD MEMBER J. REDSHAW; April 13, 1994

1. This is a referral of grievance to arbitration brought pursuant to the provisions of sec-

tion 126 of the *Labour Relations Act* in which the Board, by decision dated July 29, 1993 [now reported at [1993] OLRB Rep. July 589], found Ellis-Don Limited ("Ellis-Don") in violation of the provincial collective agreement to which it and the applicant are bound.

2. The Board remained seized of the issue of remedy. Failing any resolution of this remaining issue between the parties, a further hearing was scheduled. The Board heard the evidence of William Suppa, the Business Manager of the applicant (also referred to herein as the "Labourers" or the "union"). Ellis-Don called no evidence.

3. In its previous decision, the Board (Board Member F. B. Reaume dissenting) found that the work performed by Final Touch at the Lotto Centre in Sault Ste. Marie, under subcontract from Ellis-Don, was work in the construction industry and covered by the Labourers' collective agreement. The Board found that Ellis-Don was in violation of Article 2.05 of that agreement in failing to subcontract the work to a company in contractual relations with the Labourers. That Article reads:

2.05 The Employer agrees to engage only subcontractors who are in contractual relations with the Union and/or its affiliated bargaining agents for all work covered by this Agreement, or work forming part of an I.C.I. General Contract except as provided in Schedule "D" hereof.

4. During the course of the hearing on remedy, certain procedural and evidentiary issues arose, on which the Board made directions or rulings. It is useful to set out some of these. At the outset, both parties took the position that there was no merit to the other's position with respect to the availability of damages. Both parties took the position that, on the basis of undisputed facts or facts already found in the Board's previous decision, there was no argument to be made by the other party. In effect, both parties sought to have the Board limit the nature of the hearing by making certain rulings on the legal issues raised without hearing evidence.

5. The Board ruled that it would proceed to hear the remaining issues in their entirety. We directed both parties to call all their evidence and make final submissions on all issues remaining in dispute.

6. During the course of the hearing, at several junctures, counsel for Ellis-Don alluded to the inadequacy of particulars provided by the union prior to the hearing. As it turned out, both parties' positions on the particulars were entangled with their positions on the merits of the damages issues. It appears that counsel for Ellis-Don requested from counsel for the union a list of subcontractors that the union asserted were available and suitable to perform the work done by Final Touch. The union took the position that any contractor bound to its collective agreement was a potential subcontractor, and it was not the union's role to assess their suitability for Ellis-Don. Because of its position, it was apparent that it was not the union's intention to call evidence with respect to the particular cleaning capabilities of all of the contractors bound to its collective agreement. On this basis, counsel for Ellis-Don ultimately did not object to the Board receiving the general evidence of Mr. Suppa on this issue.

7. A related dispute arose during counsel's cross-examination of Mr. Suppa. Counsel sought to determine the basis of Mr. Suppa's assertion that any of the contractors bound to the Labourers' collective agreement were capable of performing the work done by Final Touch. Counsel questioned Mr. Suppa, for instance, as to the particular cleaning equipment owned by some of these contractors. However, at the same time, counsel objected to the Board receiving this evidence and in the alternative requested an opportunity to investigate the evidence. The Board ruled that it would not refuse to hear evidence which was elicited as a result of cross-examination. The Board further indicated that if at the end of cross-examination, Ellis-Don wished to request an

adjournment for the purpose of investigation, on the basis that the evidence was unanticipated and should have been particularized before the hearing, the Board would consider such a motion at that time. At the completion of the evidence by the union, counsel for Ellis-Don made no such motion, and called no evidence.

8. The evidence of Mr. Suppa, supported by the union's out-of-work list, was that during the period in question, there were more than enough members of the union who were out of work and available to perform the work done by Final Touch employees. He also provided the Board with copies of some referral slips showing that members of the Labourers have been referred to construction contractors in the classification of "janitor". Mr. Suppa also confirmed that at the time in question, Ellis-Don employed members of the Labourers at the Lotto Centre.

9. Mr. Suppa provided the Board with a list of contractors in and around the Sault Ste. Marie region who were, at the time that provincial bargaining came into force, bound to collective agreements with the Labourers' or a fellow local. This list is not current, and there has not been an official update to it by the contractor's association since that time. In cross-examination, Mr. Suppa testified as to a number of companies on this list which in his understanding are no longer in operation. In his evidence, any contractor which is currently signatory to the Labourers' collective agreement is capable of performing the work done by Final Touch. In particular, Mr. Suppa made reference to para.8 of the Board's prior decision, containing the description of services offered by Final Touch to Ellis-Don with respect to the Lotto Centre project. Mr. Suppa testified that any contractor bound to the Labourers' collective agreement is capable of performing that work. Most of the contractors on the list provided, who are still in business, are general contractors.

10. Mr. Suppa also testified that in the normal course, an employer is responsible for supplying the necessary equipment to a site in order to carry out construction labourers' work. Most contractors have their own equipment; where they don't, they can obtain equipment from a construction rental firm. Mr. Suppa was unable to state whether any of the contractors on the list owns the specific type of equipment which was used by Final Touch in its cleaning. He did point out, however, as an example, that one of the companies owns its own construction rental outfit. He also testified with respect to another contractor, that he had personally worked on a crew whose sole function on a job site was cleaning.

11. In argument, it was the primary position of the union that the only fact it needs to prove to show its entitlement to damages is that it had members of the union who were willing and able to perform the work in question at the time of the project. This fact has been proven by the evidence. It is irrelevant to the issue of damages whether these persons would have been employed by Ellis-Don, or by a subcontractor to Ellis-Don.

12. In any event, the union has also provided a list of contractors which are bound to its collective agreement, and has proven that some of these contractors have employed members of the Labourers to do cleaning work on construction job sites. The union ought not to be placed in the position of having to show the particular cleaning capabilities of each of these contractors with reference to the work that was actually performed at the Lotto Centre. The union cannot assess the suitability of the contractors; this is Ellis-Don's function. The collective agreement provides that an employer who is bound by it is obligated to perform work covered by the agreement with either direct employees who are members of the Labourers, or a subcontractor which has an agreement

with the Labourers. It is a management right and a management decision as to which of these routes is taken, but an employer must take one of these routes.

13. Counsel for the union contrasts Article 3 of the collective agreement with Article 2.05. Article 3, relating to the hiring of workers, provides that an employer is entitled to hire any labour which is available if the union is unable to fulfill a request to the hiring hall, subject to the non-member obtaining a referral slip from the union and applying for membership within seven days. Article 2.05 contains no similar "saving". Therefore, if an employer chooses to subcontract work covered by the agreement, it must be to another contractor bound to an agreement with the Labourers.

14. In any event, the employer here has called no evidence that could satisfy the Board that it could not have done the work itself.

15. Counsel for the employer focused on the union's acknowledgement, during the course of the hearing which led to the Board's finding on liability, that the subcontract in question is a *bona fide* subcontract. This issue arose in the prior hearing when counsel for the employer sought to question a witness on new developments in the cleaning industry since the witness began business. The question was objected to on the basis of relevance. Counsel for the employer stated that the question related to the issue of whether there are appropriate union subcontractors available to perform the work. In argument in support of the objection, union counsel stated that it is the Labourers' position that Ellis-Don has the obligation to find a union subcontractor or use its own forces to perform the work. The Labourers do not dispute that this subcontract is *bona fide*.

16. Relying on the *bona fides* of the subcontract, counsel for the employer agrees that it is a management function to decide whether to perform work covered by the collective agreement with its own employees, or to engage a subcontractor. Counsel states that having conceded that the subcontract was a "*bona fide*" subcontract, taken for proper business reasons and no other reason, the union cannot now submit that there has been wrongdoing. It is an employer's right to make decisions based on business principles.

17. Counsel for Ellis-Don submits that the Board cannot determine the soundness of the decision to subcontract. It would be impossible for an employer to prove that it could not have performed the work itself. If money and efficiency are irrelevant, any business could decide to take on any work. This cannot be the issue. Therefore, once it is accepted that it is a proper exercise of management rights to decide to perform work directly or engage a subcontractor to perform work covered by the agreement, the scope of the Board's scrutiny of the decision taken must be limited to its *bona fides*. In counsel's submission, therefore, there is nothing for the Board to decide in the case before it.

18. In any event, the evidence of the union regarding the availability of subcontractors is problematic. The evidence amounts to a general assertion that any general contractor is capable of performing the work in question, since most of the contractors referred to are general contractors. The suggestion is either that Ellis-Don could have done the work with its own forces, or else that Ellis-Don should have subcontracted the cleaning work to another general contractor. This cannot be proof of the availability of suitable union subcontractors. The Board cannot accept the notion that a general contractor should be obliged to subcontract cleaning work to another general subcontractor. There is *no* evidence tendered by the union of union subcontractors in the cleaning business.

19. Counsel agreed that Ellis-Don made no attempt to find out whether there were any union subcontractors available and suitable to perform the work. At the time, Ellis-Don did not

view the work as being in the construction industry. It has been proved wrong. At the time, however, its decision was made honestly.

20. In their submissions, counsel referred the Board to: *Re Blouin Drywall Contractors Ltd. and United Brotherhood of Carpenters and Joiners of America, Local 2486* (1975) 57 D.L.R. (3d) 200 (Ont. C.A.); *Re McKenna Brothers Ltd. and Plumbers Union, Local 527* (1975) 10 L.A.C. (2d) 273 (Shime); *Napev Construction Limited* [1980] OLRB Rep. Feb. 260; *Eton Construction Limited*, [1981] OLRB Rep. July 872; *George Ryder Construction Ltd.*, [1981] OLRB Rep. Dec. 1785; *Piggott Construction Limited*, [1985] OLRB Rep. Aug. 1290; *Steve's Sheet Metal Company*, [1986] OLRB Rep. Sept. 1309; *Bechtel Canada Inc.*, [1993] OLRB Rep. May 400; *Bechtel Canada Inc.*, [1993] OLRB Rep. July 581, and *Ontario Hydro*, [1978] OLRB Rep. April 331.

21. At the hearing, the union submitted a detailed chart showing its summary of damages owing. The chart is based on the hours of work performed by employees of Final Touch, with appropriate calculation for shift premiums, overtime and the like. Counsel for Ellis-Don had not been provided with this chart prior to the hearing, and requested an opportunity to review the chart to confirm its accuracy in terms of number of hours and when they were worked. Counsel stated that the employer did not dispute the principles applied to the calculations, but simple wanted to "double-check" the hours. The Board agreed to permit the employer this opportunity, and to receive written representations on this point.

22. The Board does not agree with counsel for the employer that the focus of the Board's inquiry is whether or not there was a *bona fide* decision taken to subcontract the work. Further, the Board does not accept that the *bona fides* of the decision taken in the case before us is determinative of the remaining issues.

23. Counsel referred the Board to *Ontario Hydro* (1978), *supra*, in which the Board analyzed the relationship between management rights and the specific provisions of a collective agreement:

From this review of the arbitral jurisprudence there emerges a general principle that management does have a right to implement retirement policies that remains unfettered by general collective agreement language relating to seniority or discharge. This right, however, is not entirely unqualified, being subject to curtailment by specific collective agreement language and by the implied qualification that it not be exercised in an arbitrary, discriminatory, or unreasonable manner.

24. To the extent that the above excerpt is a restatement of the general proposition that specific collective agreement language curtails general management rights, this would seem to be obvious and indisputable. However, we do not find it to support the position of Ellis-Don in these proceedings. Ellis-Don asserts that the employer's right to choose whether or not to subcontract is subject only to the principle of *bona fides*, which we take as analogous to the implied qualification of "arbitrary, discriminatory, or unreasonable." Such a position ignores totally the fact that Article 2.05 is a specific curtailment of the employer's management rights, as are virtually all of the provisions of this agreement. As such, the provisions of the agreement are, as set out in the excerpt above, restrictions on management rights *over and above* the *bona fides* requirement.

25. Under this agreement, an employer has the right to choose, for *bona fide* business reasons, to subcontract work covered by the collective agreement to another employer. However,

where the employer has decided to organize its work in this way, it must comply with the terms of the collective agreement. Similarly, if the employer decides to perform the work using its own forces, it must do the work subject to the terms of the collective agreement. It would come as a great surprise to the union if an employer were to take the position that, for proper business efficiency reasons, it would not apply the wage rates, hours of work, union security or any other provision in the agreement relating to its employees. Yet that is the logical extension of the arguments of Ellis-Don before us.

26. The union asserts that the combination of the union security provision and the subcontracting provision in this agreement form a complete circle. In other words, it states that an employer which undertakes work covered by the collective agreement must hire union members to perform the work directly or ensure that a union subcontractor is engaged to perform the work. There is no other alternative so long as there are union members who are available to perform the work.

27. We do not have to decide whether the obligations in this agreement are an absolute in the way suggested by the union. We will assume for the purposes of this next part of our decision that they are not, and that it is possible to read the obligations of the agreement in such a way that an employer is, in certain circumstances, relieved from the restrictions on subcontracting.

28. Even accepting this assumption, we are satisfied that this union has established its entitlement to damages as a result of the employer's violation of the collective agreement.

29. In *Re Blouin Drywall Contractors Ltd.*, *supra*, the Ontario Court of Appeal upheld an award of damages arising out of an employer's use of non-union employees, stating:

Having found that the employer was in breach of the agreement, the amount of the wages lost, and that there were union members available to do the work, the board had jurisdiction to make the order in question.

30. In *Piggott Construction Limited*, *supra*, the Board stated:

Since *Blouin Drywall and McKenna Brothers*, it has generally been sufficient for a trade union claiming damages for violation of the hiring hall or subcontracting provisions of its collective agreement, to simply establish that it had sufficient unemployed members at the times material to the grievance to have supplied the needs of the employer directly or through its subcontractor.

31. In the case before us, the union has established that there were "sufficient unemployed members at the times material to the grievance to have supplied the needs of the employer directly or through its subcontractor." Further, the union has proven that Ellis-Don has employed labourers to perform clean-up functions on a job site. It has proven that other contractors which are bound to its agreement have performed cleaning on construction sites. The employer does not deny this. What the employer questions is the expertise, supervisory capacity, and physical capacity (in terms of equipment) of either a subcontractor bound to the Labourers' agreement or of itself (Ellis-Don), to perform the work in question. The employer takes the position, essentially, that in order to prove its entitlement to damages, the union must not only show that its union members lost the opportunity to perform the work, but that there was a vehicle through which the work could have been done. Further, it puts the union to the proof that either Ellis-Don or a union subcontractor had the same equipment, expertise and supervisory capacity which was actually applied by Final Touch in performing this work.

32. The employer, in our judgement, holds too elevated a view of the union's evidentiary

obligations. We see no reason why the union should be put to such specific proof. The evidence as to the nature of the work for which Ellis-Don wished to engage a subcontractor is contained in the general contract, in which the obligations of the general contractor for final clean up is described. This portion of the general contract is set out in the Board's prior decision. It is a general description, using such phrases as "[o]n completion of work remove stains, dust, smudges caused by work within work areas of this Contract." There is no reference in this description to specific equipment, materials, or expertise required. There was no tender relating to the cleaning work in which Ellis-Don set out any specifications as to materials, equipment etc. As set out in the Board's previous decision, the relationship between Final Touch and Ellis-Don was described essentially in a general written proposal by Final Touch setting out its description of services. There is no reference in this description as well to any specialized equipment or materials.

33. In these circumstances, we see no reason why the Board ought to require the Labourers to prove, in order to establish its loss, that either Ellis-Don or a union contractor would have or could have performed the work of final clean up in *exactly* the same manner as Final Touch. There is no evidence that when Ellis-Don chose Final Touch to perform the work, Ellis-Don *required* the work to be performed in exactly the manner, and using the type of equipment and materials, as it was performed by Final Touch.

34. In these circumstances, we are satisfied that the union has proven its entitlement to compensation. It has shown that it had members available to perform the work as described above. It has also established to our satisfaction that it was within the capability of union contractors or of Ellis-Don to perform the work as described in the contract documents. Where Ellis-Don wishes to take issue with this, it seems to us to be a relatively modest burden to expect that it will call evidence to demonstrate why it could not have complied with the collective agreement obligations. In fact, it seems to us that the easiest way to establish the lack of suitable union contractors would be proof that the contract was advertised and no union subcontractors made a bid for the work.

36. We stress that our findings above are made on the assumption that there may be circumstances where an employer who chooses to undertake certain work may in some circumstances be excused from the application of both the union security provision and a subcontracting provision. We do not have to determine whether this is a valid legal theory because we have found, on the facts of this case, that there is no "excuse". In the result, we are satisfied that as a result of Ellis-Don's violation of the collective agreement, the union's members have suffered a loss of work opportunities for which they should be compensated.

37. As indicated above, counsel for Ellis-Don requested, and the Board granted an opportunity to Ellis-Don, to review the damages calculations submitted by the union, for accuracy. After the conclusion of the hearing, the Board received correspondence from the parties dated December 9, December 22, January 6, January 7, January 18, January 19 and January 22. On our review of this correspondence and the material before us, the Board makes the following findings.

38. Among the issues raised by Ellis-Don in the correspondence is the likelihood of a second shift rather than double-time for certain hours worked. At this stage of the proceedings, it is not open to Ellis-Don to dispute the principles upon which the union's damages calculations are based. Although Ellis-Don did not receive the union's damages summary until the hearing, it was open to it to request an opportunity to review it, and to leave open the option of disputing the principles upon which the calculations were based. In fact, counsel did make a request for some time to review the summary, but specifically confined the request to an opportunity to review the summary for *accuracy* of number of hours worked.

39. In our discretion, we will permit Ellis-Don a further period of two weeks from the date

of this decision to complete its review of the summary for accuracy. Unless the Board receives further submissions on this matter within that time, we will proceed to determine the sum of damages owing under this grievance on the basis of the materials before us.

DECISION OF BOARD MEMBER F. B. REAUME; April 13, 1994

1. Since I view the majority decision in this matter as untenable as far as the industry is concerned, I must dissent any award of damages.
 2. Further to my prior dissent on the merits, I would not be surprised to see a nominal amount of damages to address that portion of the clean-up work which might have *reasonably* been considered construction work before the decision.
 3. However, under the circumstances here which deal with the final clean-up of a commercial building, the respondent should clearly and unequivocally be relieved from any and all damages.
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1590-93-R United Steelworkers of America, Applicant v. 681356 Ontario Limited c.o.b. as Foyer Sarsfield Nursing Home, Responding Party

Certification - Employee - Union and employer disputing whether certain individuals should be excluded from bargaining unit because they exercise managerial functions or are employed in confidential capacity - Board finding Activity Director and Registered Nurses employed by nursing home to be "employees" within meaning of the Act - Final certificate issuing

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *J. A. Rundle* and *H. Peacock*.

DECISION OF THE BOARD; April 12, 1994

1. This is an application for certification. By decision dated September 8, 1993, the Board (differently constituted) certified the applicant on an interim basis as the bargaining agent for the following unit of employees:

all employees of 681356 Ontario Limited c.o.b. as Foyer Sarsfield Nursing Home in the Village of Sarsfield, save and except supervisors, persons above the rank of supervisor, office and clerical staff.

2. The only dispute remaining between the parties at the time of the earlier decision was whether certain named employees should be included on the list of employees in the bargaining unit, or whether they should be excluded because they exercise managerial functions or are employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3) of the Act. The responding party took the position that Stephane Henri, Rachelle Kowala, Christine Lanthier, Bernice McConnell, Joan Raphael, Norma Cummings, Janine Leroux, Tracy Marley, Gayle McCormick and Ruth Verbrugge should be so excluded; the applicant took the opposite position.

3. In the same decision, the Board appointed a Labour Relations Officer to inquire into

and report to the Board on the duties and responsibilities of the employees named in paragraph 2 above.

4. The parties subsequently met with the Labour Relations Officer and reached agreement on the status of some positions. The remaining dispute was with respect to two positions: the classification of Activity Director, held by Rachelle Kowala; and the classification of Registered Nurse, filled by Christine Lanthier, Bernice McConnell, Joan Raphael, Norma Cummings, Janine Leroux, Tracy Marley, Gayle McCormick and Ruth Verbrugge. The parties agreed that the evidence of Norma Cummings would be considered representative of the classification of Registered Nurse.

5. The report of the Labour Relations Officer consists of one volume of transcripts and two exhibits. The parties were provided with a copy of the report and invited to make representations. While neither party requested an oral hearing, they each made representations to the Board by way of written submissions and we have considered those submissions in reaching our decision.

6. Foyer Sarsfield Nursing Home provides accommodation and care for approximately 76 patients on three floors. The home is staffed by Health Care Aides ("Aides"), Registered Nurses ("R.N.'s"), the Director of Nursing, the Activity Director, maintenance staff and cooks. On each 8 hour shift either three or four Aides are assigned, generally one to each floor, and a Registered Nurse is designated as "in charge". The other staff work mostly during the day shift, including the Director of Nursing.

7. Norma Cummings testified as to the duties and responsibilities of a Registered Nurse. She works primarily on the night shift, from 11:00 p.m. to 7:00 a.m., along with three Aides who are each assigned to a floor of the home. Her work during the night generally involves the following routine: she receives a report from the previous shift; she does rounds of each floor several times during the shift; she does charting on the patients; she does other paperwork and filing relating to the residents; she deals with any maintenance problems which arise during the shift, usually by contacting maintenance staff; she takes and deals with incoming calls; she restocks supplies; she provides care to the residents as required, including dispensing medication; she provides direction to the Aides as required; and at the end of the shift she reports to the oncoming shift. She may also report problems on the shift to the Director of Nursing or the owner. Once a month she orders drugs for the residents, to ensure an adequate supply of whatever medication is ordered by the physician, and checks that order once it is received.

8. While noting that it is difficult to be precise about the allocation of her time, Cummings testified that she spent about 10% of her time supervising the Aides, 30% engaged in direct patient care, and the other 60% performing other duties as detailed above.

9. At the beginning of each shift, Cummings and the Aide on the first floor divide up the patients between them and each then provides direct patient care to "her" patients. She acknowledged that the nature of the care she provides for her patients is very similar to that provided by the Aide, except that she does not do as much cleaning. The division of patients is generally done by consensus, although she does have the final authority to assign.

10. To a large degree the tasks performed by the Aides are ones with which they are well familiar, and thus Cummings only assigns specific tasks to experienced Aides if there is an unusual requirement. With newer staff, she reviews the routine with them at the outset of the shift, and then generally assigns them to another Aide for training. She may also spend time with the new Aide periodically during the shift to explain particular tasks to them, and will check on them regularly. She is available to answer questions or deal with problems raised by any Aide.

11. As a Registered Nurse Cummings is responsible for the quality of patient care provided by the Aides on her shift, but she monitors their work through observation of the patients on rounds and by receiving reports from the next shift of any problems, rather than by constant supervision.

12. Cummings has been asked for her input on the performance of Aides at the end of their 3 month probationary period, but has no authority to decide whether they are kept on and has never recommended that an Aide not be retained. Once some years ago she was asked by the Director of Nursing to complete an annual assessment on an Aide who worked mainly on night shifts, as the Director was not sufficiently familiar with her work to complete the assessment herself. Otherwise, she does not complete the annual reviews of staff, but has been asked on occasion for her input on specific areas of an Aide's work with which the Director was not familiar. Any input by Cummings, either written or oral, is reviewed with the Director who carries out the interview with the Aide. Cummings testified that her comments could not impact on the salary an Aide received.

13. With respect to discipline, Cummings testified that she has the authority to send an Aide home for serious misconduct, although she has never had to do this. She would then report the misconduct to the Director of Nursing, who would handle the imposition of formal discipline. She has never issued a written warning to an Aide, or had a notation made of a verbal warning in an Aide's file. She does speak to Aides directly about conduct which she feels is inappropriate, particularly where it impacts on the well-being of the residents, and subsequently reports her concerns to the Director of Nursing. She does not have the power to terminate an Aide.

14. The schedule is prepared monthly by the Director of Nursing. Changes to that schedule made in advance are also generally handled by the Director. Cummings, however, has the authority to make last minute changes to the schedule where Aides request a switch, or where an Aide calls in sick or is otherwise unable to report to work. In these circumstances she may have to call through the list of Aides to find an available replacement, which may necessitate the approval of overtime. If she arranges a change in an Aide's assigned shift, she initials their punch card. She also has the authority to permit an Aide to leave early because of illness, or indeed to direct an Aide to go home in that situation.

15. The Registered Nurses and the Aides are all paid twice monthly, and receive the same benefits, including payment for overtime. Aides are not paid for the lunch period, however, while Registered Nurses are considered to be on call during lunch and are thus paid for that period. All employees of the home, including Registered Nurses, are required to punch in at the beginning and the end of their shifts.

16. Cummings testified that she played no role in the hiring of employees or the setting of rates of pay. She is not on any committees at the home, but does attend at general staff meetings which include Aides and Registered Nurses, as well as clinical training sessions for Registered Nurses. She does not attend management meetings. She has no role in the budget process. Cummings has keys to the entire building except for the office. She has no access to employee records.

17. It is clear from these facts that Registered Nurses at the home are not employed in a confidential capacity in matters relating to labour relations. It is asserted by the responding party, however, that the job description for Registered Nurses entered as Exhibit 2 demonstrates that the position involves managerial functions and that the evidence of Cummings confirms these responsibilities. Having reviewed that document and the transcript of evidence closely, however, we have concluded that the evidence discloses that Registered Nurses do not exercise managerial functions as that term has been defined by the jurisprudence of the Board.

18. In numerous cases dealing with nursing homes and hospitals, the Board has rejected the submission by an employer that the entire complement of Registered Nurses in those settings exercise managerial functions within the meaning of section 1(3) (then section 1(3)(b)) of the *Labour Relations Act* (see for example *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84; *Regional Municipality of Halton*, [1980] OLRB Rep. Nov. 1684; *Crescent Park Lodge*, [1978] OLRB Rep. Nov. 981; *Peterborough Civic Hospital*, [1973] OLRB Rep. March 154; *Toronto East General Orthopaedic Hospital*, [1974] OLRB Rep. Oct. 671).

19. The reasoning of the Board in these cases is well summarized in the *Oakwood Park Lodge*, *supra* case, at paragraph 16:

• • •

16. All of these cases, (as well as the nursing home cases referred to earlier) involved individuals who, in varying degrees were performing various supervisory or coordinating functions which historically or in other contexts might have been associated with managerial status. Such functions included: coordinating the work of others, ensuring that the work was done properly in a technical sense, checking and correcting it where necessary, scheduling, arranging for a "fill in" if a member of the team is absent, allowing an orderly or aide to go home a few hours early, giving an opinion on the proficiency, work habits, competence or compatibility of new or lesser skilled employees when asked to do so by a member of management, delegating or rearranging work assignments, calling in plumbers or maintenance persons to handle mechanical breakdowns or "off-shifts", attempting to ensure compliance with the institutional "rules" laid down by management and admonishing or reporting an employee who did not comply, consulting with management on the running of the enterprise, and, even, on occasion, requiring an employee unfit to work to go home for the balance of the shift then reporting the incident to the director of nursing for disposition. Each case, of course, turns on its own facts, but their general thrust is the same: supervisory, coordinating, reporting, consulting and *minor* admonitory functions were not, in the opinion of the Board, (and in the context of this industry) considered to be "managerial functions". They did not signify the kind of effective control or authority over the employee and his employment relationship which justified exclusion pursuant to section 1(3)(b). And in a professional context where "reporting" is part of an individual's professional responsibilities and the actual decisions are made by someone else (usually an "administrator" who may or may not be a professional himself) then the "effective recommendation test" referred to above must be carefully applied. ...

20. For these reasons we find that the Registered Nurses do not exercise managerial functions within the meaning of section 1(3) of the Act.

21. Rachelle Kowala, the Activity Director, was examined as to her duties and responsibilities, which were also listed on a job description entered as Exhibit 1.

22. As her job description indicates, Kowala is responsible for planning and implementing a programme of activities for the residents of the home. As part of that responsibility she coordinates the recruitment, selection, training, scheduling and assessment of volunteers, as well as other individuals and groups who provide services to the home such as a hairdresser, entertainers, and community groups. She liaises with residents, families and staff, through her attendance at meetings of the Resident Council and also the production of a monthly newsletter. She maintains records on the activities of each resident, and attends quarterly and annual assessment meetings on each patient. Kowala also plans and directs fund-raising events.

23. The job description for the position of Activity Director states that the position is "under the direction of the Director of Nursing". There was some dispute about Kowala's reporting relationships in the evidence. On examination by the Labour Relations Officer, Kowala stated that her immediate supervisor was the Director of Nursing, but that she might occasionally go to

the Administrator. Later in the same examination she indicated that she had never actually reported to the Administrator but that she went to him to advise him of outings, etc. at which he might want to attend. On examination by the responding party and the applicant, Kowala stated that she in fact officially reported to the Administrator, and only went to the Director of Nursing when he was not available, although she admitted that that was often the case.

24. Kowala has contact with other staff at the home on an ongoing basis, to advise them of activities planned for the residents and to ensure that they carry out whatever role they are expected to play vis-a-vis those activities. For example, she tells the kitchen staff what food and facilities will be required for activities, and tells the Registered Nurses and Aides what preparations will have to be made, i.e. dress, for the residents to attend. She speaks directly to staff in all departments if she is dissatisfied with their role in these arrangements, but reports problems to the Director of Nursing if she is unable to resolve them on her own. While she believes that she has the authority to reprimand staff in these circumstances, she has never actually done so, and has no authority to impose formal discipline or to terminate other staff. She plays no role in the scheduling or evaluation of staff.

25. Kowala does recruit, select, train and evaluate a group of unpaid volunteers. She schedules the weekly attendance of a hairdresser retained by the home on a contract to service the residents, and stated that she would have the power to select a replacement for that individual if she gave up the contract, although this has not occurred during the time she has held the job.

26. Kowala also testified that she selects her own replacement during her vacation period each summer. This past year, she approached a volunteer at the home and asked her to take on the position for the two weeks of her vacation (there was no evidence as to whom she chose in the two previous years). She did this without consultation with anyone else as to her choice, and then advised the Director of Nursing as to the arrangements she had made. The Director then told the replacement employee what pay she would receive and provided her with a time card. Kowala did not actually work with this individual except for three days of training prior to her departure, but she spoke to other staff upon her return to check on the performance of her replacement, and then passed on their assessment to the Director of Nursing.

27. There was also some evidence about plans to hire an assistant for Kowala. She testified that at some time prior to the application for certification she was advised by the Administrator that funds were being approved for a new position to be established. Kowala stated that she was confident that she would have complete authority to hire someone as her assistant, and to assign work to and evaluate that employee. She testified that the previous Activity Director selected her for the position when she was hired, and that she did not even meet the Director of Nursing or the Administrator until some time after she started. She did not know, however, whether the approval of the Director or the Administrator had been obtained before she was hired. In any event, no assistant had been hired at the time of the application for certification, and it was not clear when or if this employee would be added to the complement.

28. The activities arranged by Kowala are funded in part by the Administration of the home and in part out of an "Activity Fund" made up of monies from fund-raising activities. She estimated that she spends about \$2,000.00 per year on resident activities, but was imprecise as to what portion of that comes from the Administration. The home does regularly pay for certain activities such as a contribution each week for bingo, the cost of movies and of food. The fund-raising money is spent in part on large items such as a new VCR for the residents' use and musical instruments. Kowala testified that she had complete discretion as to the allocation of monies from the Activity Fund, and is responsible for raising funds to replenish the Fund.

29. Kowala is responsible for running meetings of the Resident Council. This duty appears on her job description, and she testified that she was told that this was expected of her when she was hired. It appears, however, that the regulations governing this Council may have changed since her employment began and that it is now required that the residents nominate a staff member to the Council. She has been so nominated at present, and was not sure whether the residents had the right to nominate anyone else. She is the only staff member who attends these meetings with residents, their families and a volunteer. She prepares minutes of the meetings and passes them on to the Administrator, who may report back to her so that information may be passed back to the Council if necessary. Part of the purpose of these meetings is so that residents can pass on any complaints they have about the home and/or the staff. She does not act on these complaints directly if they are related to a department other than her own, but rather passes the complaints on to the Administrator for action.

30. She also attends at quarterly and annual patient assessments, along with the patient, his or her family, the Registered Nurse or Aide who works most closely with the patient, the doctor, and the Director of Nursing. She passes on information and participates in discussions concerning the activities of the patient in question. In addition, she sits on the Quality Assurance Committee along with representatives from each of the departments, the Director of Nursing, and the Administrator, and is a representative on the home's Social Contract Committee which has been struck to come up with cost-saving ideas.

31. Kowala works 65 hours every two weeks, with a basic schedule of 8:30 a.m. to 3:30 p.m. Monday to Friday. There is some flexibility in this, however, depending on her scheduled activities, so she may work longer hours some days or on weekends and will then take time off in lieu of overtime. She works out of an assigned area near the dining room, where she maintains records relating to the activities of the patients. She does not have access to employee records.

32. Having carefully reviewed this evidence and the job description marked as Exhibit 1, we have concluded that the Activity Director is an employee within the meaning of the *Labour Relations Act*. It is clear that she is not employed in a confidential capacity in matters relating to labour relations. The responding party asserts, however, that she exercises managerial functions within the meaning of section 1(3) of the Act.

33. The evidence of Kowala reveals that she is not normally engaged in the supervision of employees, which is confirmed by her job description. Her limited contact with the other staff at the home does not involve her exercising effective control over them as that term has been defined in the jurisprudence of the Board. She does supervise volunteers, but they are not employees within the meaning of the Act. The employer argues, however, that she exercises effective control over the employee which replaces her during her summer vacation, and also that she will exercise such control over an assistant whom they submit is to be hired.

34. Although there was some evidence that an assistant to Kowala was likely to be hired by the home, the Board's determination on the status of the Activity Director is limited to the time at which the application for certification was filed. At that time, there was no employee working under Kowala's direction, and it would be speculative to reach any findings of fact with respect to Kowala's likely role in the hiring and supervision of any employee who may be hired.

35. We are also not convinced that Kowala's role in the selection and monitoring of her replacement over the summer vacation period results in her exercising managerial functions within the meaning of the Act. While Kowala testified that she has complete discretion in the selection of a replacement, we find it more probable than not, and consistent with the nature of her duties as a whole, that Kowala's supervisors retain a considerable discretion to accept or reject her choice as

replacement. At most, the evidence only demonstrates that in the past three years, the home has not had reason to reject her choice. The fact remains, however, that the Activity Director reports her selection to the Director of Nursing who makes the actual arrangements for the employment of that individual, including communicating rates of pay and making practical arrangements such as providing her with a time card.

36. The remainder of Kowala's activities vis-a-vis her replacement are clearly not in the nature of managerial responsibilities. She does not engage in the day-to-day supervision of the employee in question as she is on vacation for all but a brief orientation period. And while she does consult with other staff about the performance of the replacement employee upon her return, she reports this information to the Director of Nursing for whatever limited purpose it may have given that the employee is no longer engaged by the home and her employment can thus not be affected by this evaluation.

37. Where individuals are not engaged directly in the management of employees, the Board has nonetheless excluded them from the application of the Act where they exercise a significant degree of independent decision-making authority over important aspects of the employer's business. The employer relies on this analysis as well in seeking a managerial exclusion of the Activity Director, citing in particular her responsibilities vis-a-vis the residents and their families, and her control of the Activity Fund. While these job duties are clearly important functions for the home, it is not really accurate to characterize them as giving Kowala authority over important aspects of the employer's business. Kowala has been nominated to sit on the Resident Council, but she reports any complaints raised in that forum relating to aspects of the home other than the activity programme to the Administrator, and he is responsible for responding to and/or taking action on those complaints. She is only one of several staff, including senior staff such as the Director of Nursing, involved in patient assessments. And her discretion with respect to the relatively small Activity Fund budget is clearly circumscribed by the mandate for activities set out on her job description.

38. For these reasons we find that the Activity Director does not exercise managerial functions within the meaning of section 1(3).

39. A final certificate will issue to the applicant in respect of the bargaining unit described in paragraph 1.

CONCURRING OPINION OF J. A. RUNDLE; April 12, 1994

1. I concur with the result of this decision, as that result articulates that which is contemplated by the *Labour Relations Act* in cases of this sort. I do however feel that the role of "Activity Director" is one that cannot be properly evaluated under the current scheme of the Act.

2. The role of "Activity Director" is a pivotal one in an institution of this sort, due to the unique role they are called upon to play in the relationship between client, administration and staff. Perhaps once the assistant to the Activity Director is hired, the role will more clearly fall within the exclusion parameters defined by the Board.

1582-93-U; 1644-93-U United Steelworkers of America, Applicant v. Group 4 C.P.S. Limited, Responding Party

Certification - Change in Working Conditions - Natural Justice - Practice and Procedure - Sale of a Business - Unfair Labour Practice - Union alleging that employer violating statutory freeze - Employer acknowledging its status as "successor employer" by virtue of section 64.2 of the Act, but arguing that Board ought to dismiss complaint due to union's 3 1/2 month delay in bringing complaint - Employer also submitting that statutory freeze not applying to it because it never received notice of union's certification application - Board declining to dismiss for delay and finding that statutory freeze applying to successor employer under section 64(3) of the Act - Employer's preliminary motions dismissed

BEFORE: *Jules Bloch*, Vice-Chair, and Board Members *D. A. MacDonald* and *E. G. Theobald*.

APPEARANCES: *P. Turtle*, *Gerry Popew* and *Chris King* for the applicant; *Richard Nixon*, *Roy Fitz-Gerald*, *Howard Fitz-Gerald*, *Neil Weaver* and *Naomi Morisawa* for the responding party.

DECISION OF THE BOARD; April 7, 1994

1. The style of cause is amended to reflect the correct name of the responding party: "Group 4 C.P.S. Limited".
2. These matters are applications under section 91 of the *Labour Relations Act* ("the Act"). The Applicant, United Steelworkers of America ("USWA"), in Board File #1644-93-U, filed on August 23, 1993, alleges that the responding party Group 4 C.P.S. Limited ("Group 4 C.P.S." or "successor employer") violated the *Act* in changing terms and conditions of employment contrary to section 81(2) of the *Act*. Board File #1582-93-U is an allegation, by USWA, that the termination of Orville Daley, by Group 4 C.P.S., contravened the *Act*. On January 3, 1994 USWA requested leave of the Board to withdraw the complaint in Board File #1582-93-U. The complaint in Board File #1582-93-U is withdrawn with leave of the Board.
3. On the first day of the hearing, Group 4 C.P.S. stipulated that by operation of law it was the successor employer to Barnes Security Services Ltd. c.o.b. Metropol Security - A division of Barnes Security Services Ltd. ("Barnes-Metropol" or "predecessor employer"). As well, the Board ruled that it would deal with two preliminary issues raised by Group 4 C.P.S. prior to entertaining the merits of the complaint. Group 4 C.P.S. asked the Board to dismiss the application on two grounds. First, it argued that the delay in bringing the application before the Board was so lengthy that the Board should exercise its discretion and dismiss the complaint; and second, that for section 81 (2) to apply in these circumstances, Group 4 C.P.S. would have had to received notice from the Board, as a condition precedent, of the USWA's application for certification in respect of the predecessor. It is agreed by both parties that Group 4 C.P.S. did not receive "Board notice" of the application for certification prior to the filing of the instant application. The USWA was granted an "interim" certification prior to May 1, 1993, the date Group 4 C.P.S. became the successor employer.
4. This matter was heard in Toronto on October 4, 5, 6, 7, and December 6 and 7 1993. The parties adjourned November 22, 25, and 29, 1993. The Board dismissed the Responding Party's delay motion on October 6, 1993. The following are the reasons for the October 6, 1993 decision and the decision and reasons for the second preliminary matter raised by the Responding Party.

5. The parties referred to both the Rules of Procedure and sections of the *Act* that existed prior to *S.O. 1992, c.21* ("Bill 40") and sections of the *Act* and Rules of Procedure that existed after the coming into force of Bill 40. The parties also referred to Part XIII.2 (Successor Employers) of the *Employment Standards Act*, R.S.O. 1990 c.E. 14.

6. The following are the "post-Bill 40", sections of the *Act* and the Rules of Procedure referred to by the parties:

Rules

16. Where a party in a case intends to allege improper conduct by any person, he or she must do so promptly after finding out about the alleged improper conduct and provide a detailed statement of all material facts relied upon, including the circumstances, what happened, and when and where it happened, and the names of any persons said to have acted improperly.

17. An application or response may not be processed if it does not comply with these Rules.

20. No person will be allowed to present evidence or make any representations at any hearing about any material fact relied upon which the Board considers was not set out in the application or response and filed promptly in the way required by these Rules, except with the permission of the Board. If the Board gives such permission, it may do so on such terms as it considers advisable.

Sections of the Act

64.(1) In this section,

"business" includes one or more parts of a business; ("entreprise")

"predecessor employer" means an employer who sells his, her or its business; ("employeur précédent")

"sells" includes leases, transfers and any other manner of disposition; ("vend")

"successor employer" means an employer to whom the predecessor employer sells the business. ("employeur qui succède")

(1.1) This section applies when a predecessor employer sells a business to a successor employer.

(2) If the predecessor employer is bound by a collective agreement, the successor employer is bound by it as if the successor employer were the predecessor employer, until the Board declares otherwise.

(2.1) If the predecessor employer is a party to any of the following proceedings, the successor employer is a party to the proceeding as if the successor employer were the predecessor employer, until the Board declares otherwise:

1. A proceeding before the Board under any Act.
2. A proceeding before another person or body under this Act or the *Hospital Labour Disputes Arbitration Act*.
3. A proceeding before the Board or another person or body relating to the collective agreement.

(2.2) If the predecessor employer has given or been given a notice relating to bargaining for a collective agreement or has requested the appointment of a conciliation officer or mediator, the successor employer is considered to have given or been given the notice or to have made the request, until the Board declares otherwise.

(3) If, when the predecessor employer sells the business, a trade union is the bargaining agent for any employees of the predecessor employer, has applied to become their bargaining agent or is attempting to persuade the employees to join the trade union, the trade union continues in the same position in respect of the business as if the successor employer were the predecessor employer.

64.2-(1) This section applies with respect to services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services.

(2) This section does not apply with respect to the following services:

1. Construction.
2. Maintenance other than maintenance activities related to cleaning the premises.
3. The production of goods other than goods related to the provision of food services at the premises for consumption on the premises.

(3) For the purposes of section 64, the sale of a business is deemed to have occurred,

- (a) if employees perform services at premises that are their principal place of work;
- (b) if their employer ceases, in whole or in part, to provide the services at those premises; and
- (c) if substantially similar services are subsequently provided at the premises under the direction of another employer.

(4) For the purposes of section 64, the employer referred to in clause (3)(b) is considered to be the predecessor employer and the employer referred to in clause (3)(c) is considered to be the successor employer.

(5) This section shall be deemed to have come into force on the 4th day of June, 1992.

81.-(2) Where a trade union has applied for certification and notice thereof from the Board has been received by the employer, the employer shall not, except with the consent of the trade union, alter the rates of wages or any other term or condition of employment or any right, privilege or duty of the employer or the employees until,

- (a) the trade union has given notice under section 14, in which case subsection (1) applies; or
- (b) the application for certification by the trade union is dismissed or terminated by the Board or withdrawn by the trade union.

The following are the, pre-Bill 40, sections of the *Act* and Rules of Procedure referred to by the parties:

Rules

71.-(1) Where an application or complaint does not, in the opinion of the board, make out a *prima facie* case for the remedy requested, the Board may dismiss the application or complaint without a hearing and it shall in its decision state the reason for the dismissal.

(2) The applicant or complainant may within ten days after he is served with the decision of the Board under subsection (1) request the Board to review its decision.

(3) A request for review under this section shall contain a concise statement of the facts and reasons upon which the applicant relies.

(4) Upon a request for review being filed, the Board may,

- (a) direct that the application or complaint be re-opened and proceeded with by the Board in accordance with the provisions applicable thereto;
- (b) direct the registrar to serve the applicant and any other person who in the opinion of the Board may be affected by the application or complaint with a notice of hearing to show cause why the application or complaint should be re-opened; or
- (c) confirm its decision dismissing the application or complaint.

72.-(1) Where a person intends to allege, at the hearing of an application or complaint, improper or irregular conduct by any person, he shall,

- (a) include in the application or complaint; or
- (b) file a notice of intention that shall contain,

a concise statement of the material facts, actions and omissions upon which he intends to rely as constituting such improper or irregular conduct, including the time when and the place where the actions or omissions complained of occurred and the names of the persons who engaged in or committed them, but not the evidence by which the material facts, actions or omissions are to be proved, and, where he alleges that the improper or irregular conduct constitutes a violation of any provision of the Act, he shall include a reference to the section or sections of the Act containing such provision.

(2) Where, in the opinion of the Board, a person has not filed notice of intention promptly upon discovering the alleged improper or irregular conduct, he shall not adduce evidence at the hearing of the application of such facts, except with the consent of the Board and, if the Board deems it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

(3) Where a statement in an application or complaint or in any document filed under these Rules in respect of the application or complaint is so indefinite or incomplete as to hamper any person in the preparation of his case, the Board may, upon the request of the person made promptly upon receipt of the application, complaint or document, direct that the information stated be made specific or complete and, if the person so directed fails to comply with the direction, the Board may strike the statement from the application, complaint or document.

(4) No person shall adduce evidence at the hearing of an application or complaint of any material fact that has not been included in the application or complaint or in any document filed under these Rules in respect of the application or complaint, except with the consent of the Board and, if the Board considers it advisable to give such consent, it may do so upon such terms and conditions as it considers advisable.

The Act

63.-(1) In this section,

- (a) “business” includes a part or parts thereof;
- (b) “sells” includes leases, transfers and any other manner of disposition, and “sold” and “sale” have corresponding meanings.

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if he had been a party thereto and, where an employer sells his business while an application for certification or termination of bargaining rights to which he is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if he were named as the employer in the application.

(3) Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 14 or 53, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 14 or 53, as the case requires.

(4) Where a business was sold to a person and a trade union or council of trade unions was the bargaining agent of any of the employees in such business or a trade union or council of trade unions is the bargaining agent of the employees in any business carried on by the person to whom the business was sold, and,

- (a) any question arises as to what constitutes the like bargaining unit referred to in subsection (3); or
- (b) any person, trade union or council of trade unions claims that, by virtue of the operation of subsection (2) or (3), a conflict exists between the bargaining rights of the trade union or council of trade unions that represented the employees of the predecessor employer and the trade union or council of the trade unions that represents the employees of the person to whom the business was sold,

the Board may, upon the application of any person, trade union or council of trade unions concerned,

- (c) define the composition of the like bargaining unit referred to in subsection (3) with such modification, if any, as the Board considers necessary; and
- (d) amend, to such extent as the Board considers necessary, any bargaining unit in any certificate issued to any trade union or any bargaining unit defined in any collective agreement.

The following are the sections of the *Employment Standards Act* referred to by the parties:

Part XIII.2

Successor Employers

56.3 In this Part,

“previous employer” means the employer who ceases to provide services at a premises;

“successor employer” means the employer who begins to provide, at the premises, services substantially similar to those provided at a premises by the previous employer.

56.4-(1) This Part applies if one employer ceases to provide particular services at a premises after the 4th day of June, 1992 and another employer begins to provide substantially similar services at the premises.

(2) This part does not apply if the previous employer sells to the successor employer the business of providing the services at the premises.

(3) In this section, "services" means services provided directly or indirectly by or to a building owner or manager that are related to servicing the premises, including building cleaning services, food services and security services but excluding the following:

1. Construction.
2. Maintenance other than maintenance activities related to cleaning the premises.
3. The production of goods other than goods related to the provision of food services at the premises for consumption on the premises.

56.5-(1) This section applies to a manager or owner of a premises who,

- (a) ceases to provide particular services at the premises and uses another employer to provide them;
- (b) ceases to use an employer to provide particular services at the premises and uses another employer to provide them; or
- (c) provides particular services at the premises after ceasing to use another employer to provide them.

(2) The owner or manager, as the case may be, shall notify the employees of the previous employer of the date on which the previous employer ceases to provide the services at the premises.

(3) The notice must be given in writing at least fifteen days before the date on which the previous employer ceases to provide the services.

56.6-(1) If a successor employer replaces a previous employer who is providing services at the premises, the successor employer shall make reasonable offers of available positions to those persons,

- (a) who are in a continuing or a recurring and cyclical employment relationship with the previous employer immediately before the successor employer begins providing the services at the premises; and
- (b) whose principal place of work with the previous employer is the premises affected by the change in the employer providing the services.

(2) The successor employer shall make offers to the persons employed by the previous employer in descending order of each person's seniority with the previous employer until all positions are filled.

(3) The successor employer is not required to offer positions to persons who are not qualified to perform the services required of them or would not become qualified to do so with a reasonable period of training.

(4) The successor employer shall use every reasonable effort to fill all positions at the premises with persons who are employed by the previous employer before the successor employer offers a position to any other person.

(5) The position offered must consist of performing, at the same premises, the same work that the person did for the previous employer, if such a position is available.

(6) If such a position is not available, the position offered must consist of alternative work that is

comparable having regard to compensation, hours and schedule of work, perquisites, quality of working environment, degree of responsibility, job security and possibility of advancement.

56.7-(1) For the purposes of Parts VII, VIII, XI and XIV, a person employed by the previous employer who accepts a position offered by the successor employer is deemed to have been employed by the successor employer for the period during which he or she was employed by any previous employers.

(2) In subsection (1), “previous employers” includes only the employer who employs the employee of the 4th day of June, 1992 and any successor employers who employ him or her before the successor employer referred to in subsection (1).

56.8-(1) A person who declines a position offered by the successor employer under section 56.6 and who ceases to be employed by the previous employer is deemed, for the purposes of this Act, to have resigned his or her position with the previous employer.

(2) If the successor employer offers the person employment that does not begin immediately after his or her employment with the previous employer ends and the person declines the offer, the person is not deemed to have resigned his or her employment with the previous employer and the successor employer shall comply with Part XIV.

56.9-(1) If the successor employer does not offer a position to a person employed by the previous employer, the successor employer shall comply with Part XIV.

(2) For the purposes of Part XIV, the successor employer, and not the previous employer, is deemed to have been the employer of the person.

56.10-(1) If an employment standards officer finds that the successor employer failed to offer a position to a person when the successor employer was required to do so under section 56.6, the employment standards officer shall determine whether the person to whom the offer should have been made has suffered a loss of wages and other employment benefits as a result of not receiving the offer and, if so, shall determine the amount of the loss.

(2) An employment standards officer who finds that a job offer made by the successor employer is not a reasonable offer shall determine whether the person to whom the offer was made has suffered a loss of wages and other employment benefits as a result and, if so, shall determine the amount of the loss.

(3) The amount of the loss continues to accumulate until the successor employer makes a reasonable offer of employment to the person, until the person is reinstated or until the person notifies the successor employer in writing that he or she no longer wishes to receive an offer, whichever occurs first.

(4) The amount determined to be the loss shall be deemed, for the purposes of this Act, to be wages owing to the person by the successor employer.

(5) A person who may have suffered a loss of wages and other employment benefits is deemed to be an employee of the successor employer for the purpose of pursuing remedies under sections 65, 66, 67 and 68 against the successor employer.

(6) If the successor employer offers a position to the person after an employment standards officer makes a finding under this section against the successor employer and the person to whom the offer is made declines it, the successor employer shall comply with Part XIV.

(7) For the purposes of Part XIV, the successor employer, and not the previous employer, is deemed to have been the employer of the person.

(8) The amount of the successor employer's obligations under Part XIV is calculated using the wage rate earned by the person while he or she was employed by the previous employer.

56.11-(1) Upon request, an employer providing services at a premises shall give the owner or the

manager of the premises the following information about the employees who are providing the services:

1. A job description for each of the positions held by the employees.
2. The wage rates for each position.
3. The number of persons employed in each position at the premises.
4. A list of persons employed in each position, each person's seniority, and their hours and schedule of work.
5. The name of each employee and his or her address as it appears in the employer's records.

(2) Upon request, the owner or the manager of the premises shall give the information described in subsection (1) about the employees who are providing the services at the premises on the request date,

- (a) to a person who becomes a successor employer providing the services; or
- (b) to the bargaining agent for employees to whom the owner or manager has given notice under section 56.5.

(3) Upon request, the owner or the manager of the premises shall give the information described in paragraphs 1 to 4 of subsection (1) about the employees who are providing the services at the premises on the request date to a person who may become a successor employer providing the services but, in the information described in paragraph 4 of subsection (1), the names of persons employed in each position need not be given.

(4) A person to whom information is given under this section shall use the information only for the purpose of complying with this Part.

(5) A person in possession of information given under this section shall not disclose it except as authorized by this section.

(6) The Lieutenant Governor in Council may make regulations,

- (a) requiring employers providing services at premises, or requiring owners or managers of premises, to give the information described in subsection (1) with the Ministry;
- (b) governing the filing of information required by regulations made under clause (a).

56.12 If a person fails to comply with the provisions of this Part, an employment standards officer may order what action, if any, the person shall take or what the person shall refrain from doing in order to constitute compliance with this Part and may order what compensation shall be paid by the person to the Director in trust for other persons.

7. In a letter from the Metropolitan Toronto Housing Authority ("MTHA") to Mr. W.R. Fitz-Gerald, President & C.E.O of the Canadian Protection Services Limited (for our purposes Group 4 C.P.S) dated March 9, 1993, Group 4 C.P.S. was officially informed that it had become the successor tenderer to Barnes-Metropol, to provide security services to MTHA Districts #1 and #6. The Barnes-Metropol contract was to expire on April 30, 1993 and the Group 4 C.P.S. contract was to start on May 1, 1993. The USWA filed an application for certification of Barnes-Metropol on March 22, 1993 (Board File #3732-92-R). The notice to employees was posted on or about March 29, 1993. On April 2, 1993 the Ontario Public Service Employees Union ("OPSEU"), filed an intervention in respect of the application for certification in Board File

#3732-92-R. On April 19, 1993 the Board issued an “interim certificate”. At paragraph 9 of that decision the Board ruled:

9. Accordingly, the Board, pursuant to its discretion under section 6(2) of the Act, having regard to the agreement of the parties and pending the final resolution of the composition of the bargaining unit, certifies the applicant as the bargaining agent for all employees of Barnes Security Services Ltd. employed at Metropolitan Toronto Housing Authority facilities in the Regional Municipality of Metropolitan Toronto, save and except Managers and persons above the rank of Manager, and pending the resolution of the status of the category, excluding as well Field Supervisors and persons above the rank of Field Supervisor.

8. The USWA’s application for certification was launched, and an “interim” certification was granted to USWA, after Group 4 C.P.S. had won its tender to provide security services in MTHA Districts #1 and #6, but before the May 1, 1993 security contract start date. The tender documents disclose that the Group 4 C.P.S. “tendered” wage rates that were less in all categories than the Barnes-Metropol wage rates on April 30, 1993.

9. OPSEU’s intervention in Board File #3732-92-R, which was withdrawn prior to the granting of the interim certification, informed the parties to that proceeding that Group 4 C.P.S. had won the tender to provide security services starting on May 1, 1993 in MTHA Districts #1 and #6. Board File #3732-92-R has proceeded to date without the involvement of Group 4 C.P.S. No party sought to add Group 4 C.P.S. as an interested party.

10. The parties stipulated the following facts. Prior to May 1, 1993 Group 4 C.P.S. did a number of things in preparation for assuming the security contract. Group 4 C.P.S. asked some of the Barnes-Metropol employees to apply for jobs and directed them to where they could get application forms. These Barnes-Metropol employees were never guaranteed employment by Group 4 C.P.S. Group 4 C.P.S. trained some of the Barnes-Metropol employees. At those training sessions the Barnes-Metropol employees were told, by Group 4 C.P.S. management, that they were not going to get paid for these sessions, however, sometime after May 1, 1993 these employees were paid for the training sessions. Group 4 C.P.S. eventually hired a number of the Barnes-Metropol security guards who had worked in Districts #1 and #6 to continue in their former positions. These employees had their security guard licences switched from Barnes-Metropol on April 30 1993 to Group 4 C.P.S. on May 1, 1993. Employees of Barnes-Metropol were advised, by both Barnes-Metropol and Group 4 C.P.S., of the termination of the security contract between MTHA and Barnes-Metropol, and returned equipment belonging to Barnes-Metropol at the end of the last shift at midnight April 30, 1993. Only some of the security guards that were hired by Group 4 C.P.S. from Barnes-Metropol were told about reporting times and places, uniform arrangements, wage rates, and benefits prior to May 1, 1993. The employees of Group 4 C.P.S. working in MTHA Districts #1 and #6 did not receive their first pay cheque from Group 4 C.P.S. until two weeks after they had started work.

11. The parties called witnesses to deal with an issue arising in respect of the motion to dismiss the application because of the allegedly lengthy delay in bringing the application. While this evidence may have some utility should there be need for any further proceedings in this matter, the Board in dismissing this motion did not find it necessary to make credibility judgements in respect of the evidence dealing with informal notice. The evidence of Omero Landi, Roy Fitz-Gerald, and Mr. Christie is consistent in respect of the bargaining relationship between Group 4 C.P.S. and USWA throughout the province of Ontario. The evidence of Omero Landi differs from the evidence of Roy Fitz-Gerald and Mr. Christie in respect of what was discussed at certain meetings. Mr. Landi testified that during certain meetings in May, he raised the issue of the statutory freeze under the *Act* and the company’s statutory obligations pursuant to the *Employment Standards Act*, in respect of the employees in MTHA Districts #1 and #6, with Mr. Fitz-Gerald. As well, Mr.

Landi testified that on April 5, 1993 he had a phone conversation with Mr. Christie wherein he raised the issue of the statutory freeze under the *Act* and the company's statutory obligations pursuant to the *Employment Standards Act* in respect of Districts #1 and #6. Both Mr. Fitz-Gerald and Mr. Christie deny that conversations involving the company's statutory obligations as they relate to the bargaining unit in Board File #3732-92-R ever took place.

12. The parties made detailed submissions in respect of the delay motion. They referred to the following cases:

Toronto Typographical Union No. 91 v. CCH Canadian Limited, [1977] OLRB Rep. June 351

Dhanota v. International Union United Automobile, Aerospace & Agricultural Implement Workers of America, (U.A.W.) Local Union No. 1285 and Sheller-Globe of Canada Ltd., [1982] OLRB Rep. January 113

Daley v. The Amalgamated Transit Union and The Corporation of the City of Mississauga, [1982] OLRB Rep. March 420

Bhanga and Nkrumah v. United Food & Commercial Workers Local #287 and Bonello and Caravelle Foods, [1983] OLRB Rep. June 875

The Mount Nemo Truckers Association, Local 566, Affiliates of the United Cement, Lime & Gypsum Workers International Union, AFL-CIO-CLC v. Nelson Quarry Operation of Genstar Stone Products Inc. et al., [1983] OLRB Rep. September 1531

United Steelworkers of America v. John T. Hepburn, Limited, [1984] OLRB Rep. January 39

International Brotherhood of Electrical Workers v. Agincourt Electric and/or Agincourt Electrical Contracting Company and/or KNK Limited, [1991] OLRB Rep. February 209

John Kohut v. The National Automobile, Aerospace and Agricultural Implement Workers' Union of Canada (C.A.W. - Canada) and its Local 303 and General Motors of Canada Limited, [1991] OLRB Rep. December 1367

United Brotherhood of Carpenters and Joiners of America Local Union 785 L-K Interior Contracting Ltd., 754762 Ontario Inc. a.k.a. Tri-County Contracting et al., [1991] OLRB Rep. December 1416

Canadian Union of Public Employees, Local 3419 v. Harrowood Seniors' Community, [1992] OLRB Rep. February 177

Gary Hopkins v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, U.A.W., Local 199 v. General Motors of Canada Limited, [1985] OLRB Rep. May 684

George Hinkson v. Canadian Conference of Teamsters, Chemical Energy & Allied Workers Division, Local 2177, v. BASF Inmont Canada Inc., [1987] OLRB Rep. Oct. 1246

Donald Putman, Norman Rae, John McKinnon and Thomas Edward Mon-ger v. Tecumseh Products of Canada, Limited, [1985] OLRB Rep. Jan. 123

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 v. Calo-rific Construction Limited v. Millwright District Council, [1988] OLRB Rep. Feb. 115

Cameron Douglas Wonch v. International Union of Operating Engineers Local 793, [1984] OLRB Rep. Nov. 1659

Regina v. W.G.G. (1990), 58 C.C.C. (3d) 263

13. Group 4 C.P.S. argued that the delay of three and one-half months affects the case on the merits. The witnesses memories fade. Group 4 C.P.S. will not be able to lead evidence or defend allegations because USWA did not act promptly. Although technically this is a three month and one-half month delay, starting on May 1st, 1993 and stopping with the filing of the instant application on August 23, 1993, in reality, counsel for the responding party submitted, the delay starts on or about March 29, 1993 the day the Board posted the Barnes-Metropol application for certification in Board File #3732-92-R. By that time the security guard community was already aware that Group 4 C.P.S. is going to take over MTHA Districts #1 and #6. As well, all on-site personnel had access to the postings. USWA should have put Group 4 C.P.S. on notice at that time. Certainly, by April 2, 1993 after the Intervention by OPSEU all parties should have known that Group 4 C.P.S. was an interested party. Group 4 C.P.S. only received "Board notice" of Board File #3732-92-R when it received the instant complaint from the Board on August 26, 1993.

14. Between March 9, 1993 and May 1, 1993 Group 4 C.P.S. was busily setting up for the imminent successorship. Group 4 C.P.S. had statutory obligations, pursuant to the *Employment Standards Act*, to meet. Had Group 4 C.P.S. known, at an earlier time, that it potentially had to meet statutory obligations under the *Act* as well, asserted its counsel, it could have governed itself accordingly. As a consequence of not being notified of a certification application in Board File #3732-92-R and the potential obligations that it would be under by operation of the *Act*, Group 4 C.P.S. was not in a position to make records of the discussions that took place in respect of a "reasonable expectations" defence. Further, asserted counsel for Group 4 C.P.S., as a consequence of not being notified it was exposed to retrospective financial liability. This exposure could have been headed off, or at least minimized, if it had been notified about the application for certification. The pressure on Group 4 C.P.S. in respect of its new employees and its labour relations with these new employees have also been affected. (see: *The Corporation of the City of Mississauga* at paragraph 20 and 22.)

15. Counsel for the responding party submitted that USWA is a sophisticated party with sophisticated legal counsel. When the Board is faced with this type of party before it, then the Board should treat this type of party on a higher standard than the unrepresented unsophisticated litigant. (See: *The Corporation of the City of Mississauga*, at paragraph 22; *Caravelle Foods*, at paragraph 10; *Tecumseh Products of Canada, Limited*, at paragraph 24 and 25).

16. Group 4 C.P.S. asserted that it was unreasonable for the USWA to withhold notice. USWA knew or ought to have known that this situation was going to turn on what the reasonable expectations of the Barnes-Metropol employees were going to be. The *Employment Standards Act* mandates that a successor employer make reasonable offers of available positions to the employees working for the previous employer. Arguably, "reasonable offers" is a less onerous legal standard than the standard imposed by the statutory freeze. Group 4 C.P.S. did not keep records of conver-

sations with employees who were accepting the “reasonable offers”. Much of the evidence that could have been preserved was unremarkable at the time. What makes that evidence remarkable is the instant application. Group 4 C.P.S. submitted that it has been prejudiced by the responding party’s failure to promptly notify it about the certification of Barnes-Metropol. (See: *John T. Hepburn, Limited, supra* at paragraph 11.)

17. Group 4 C.P.S. asserted that, before the Board can dismiss the delay motion, the Board must satisfy itself that there has been a reasonable excuse for the delay. (*The City of Mississauga, supra*; *John Kohut, supra*; *Cameron Douglas Wonch, supra*; *Tecumseh Products of Canada, Limited, supra*)

18. The responding party reviewed many of the cases cited above in paragraph 12 in respect of the length of delay. It was unable to provide the Board with a case which dismissed an application because of a three month delay. As well, it was unable to provide the Board with a case wherein a party had to provide the Board with a reasonable excuse for a delay of three months.

19. Group 4 C.P.S. asserted that in the post-Bill 40 era, and in particular because of the new Rules of Procedure, there is a greater emphasis on alleging misconduct promptly. The old rules did not contain a rule which would allow the Board not to process the application or response where there is non-compliance with the Rules (Rule 17.) As well, the wording of the “new rules” is “tougher” than the wording of the “old rules”.

20. It is clear that Bill 40 has initiated a new era of labour relations in Ontario. The parties argued that there is an expectation that most applications will be dealt with faster. The legislation requires that the Board, in respect of a certain type of application, sit Monday to Thursday week to week until the application is disposed of. The Board on its own has decided to place in its expedited process a greater number of types of applications than the statute strictly requires. As well, the Board, through its authority pursuant to section 105 of the Act and its Rules of Procedure, has created within the labour relations community an expectation of a streamlined process where parties know up front, in full detail, the cases they have to meet. It is in this atmosphere that Group 4 C.P.S. asked the Board to dismiss an application because of a delay of three months.

21. In *City of Mississauga, supra*, the Board stated at paragraph 22, that delay should be measured in months rather than years:

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, *that limit should be measured in months rather than years.*

22. This is a case about months and not years. This delay motion took two days to argue. Although it is axiomatic that parties can present full argument to the Board on matters preliminary to the merits, here we are dealing with a very short delay, which prior to Bill 40 would have potentially raised an issue of prejudice which the responding party could have asked us to deal with remedially by limiting damages if we had found that damages should be awarded against that party.

23. This case presents the Board with a need to balance the parties' need for fairness. The responding party raises issues of prejudice. Group 4 C.P.S. is worried that certain evidence that might be brought forth as a defence to the merits has been lost because the evidence was unremarkable at the time. As well, the financial liability keeps mounting each week and in its view there is no way to mitigate the potential loss. In its view this problem is especially grave because it believed that had it known about the application for certification prior to May 1, 1993 it would have been able to mitigate its potential damages by withdrawing from its security contract with the MTHA. USWA expected that it should have been allowed to litigate this matter without having to defend its actions in respect of a delay of short duration.

24. The Board generally will not refuse to entertain a complaint unless the delay has been for a significant period of time. The Board, in cases of short delay, will usually deal with the delay by taking it into account when considering the extent of compensation or other relief to be given if the complaint succeeds on its merits. (See: *John T. Hepburn, Limited, supra*; *Gary Hopkins, supra*)

25. The dismissal of this motion is without prejudice to the right of the responding party to raise this matter as a remedial issue.

26. In respect of the second preliminary issue, the parties presented extensive submissions about the inter-relationship of section 81(2), section 64(2.1), section 64(2.2) and section 64 (3). There are two main arguments raised by the parties in this matter. The first deals with the "flow through", pursuant to section 64(2.1), of the statutory freeze, from the predecessor employer to the successor employer as a consequence of the successor employer being a party to any proceeding under the *Act* that the predecessor employer was a party to. The parties referred to this scenario as the successor employer "stepping into the shoes" of the predecessor employer in respect of all proceedings before the Board. The focus of Group 4 C.P.S' argument in that respect is that the "statutory freeze" is not part of any proceeding but rather a separate stand alone section which has not been imported into the statutory language of either section 64 (2.1) or 64 (2.2). The second is the argument of the USWA that it continues in the same position in respect of the business as if the successor employer were the predecessor employer.

27. Section 64 (2.1), 64 (2.2) and 64 (3) are not interdependent sections of the *Act*. The Board in deciding whether the statutory freeze environment applies to the successor employer found it unnecessary to interpret section 64 (2.1) in relationship to section 81(2).

28. The parties referred to the following cases during their submissions to the Board:

Re Hoogendoorn and Greening Metal Products & Screening Equipment Co. et al. (1967), 65 D.L.R. (2d) 641 (S.C.C.)

Re Bradley et al. and Ottawa Professional Fire Fighters Association et al., [1967] 2 O.R. 311 (Ont. C.A.)

International Association of Heat and Forest Insulators and Asbestos Workers, Local 95 v. Per-fec-tion Insulations Limited et al., [1980] O.L.R.B. Rep. March 352

United Electrical, Radio and Machine Workers of America (UE) v. Tektron Equipment Corporation et al., [1983] OLRB Rep. Nov. 1932

Wonch v. Rapid Ready Mix, [1985] OLRB Rep. January 104

Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91 v. Trans Continental Printing Inc. et al., [1989] OLRB Rep. November 1187

Christian Labour Association of Canada v. Oxford Manor Rest Home, [1980] OLRB Rep. December 1786

Bartlett v. United Food & Commercial Workers International Union, Local Union 175 and Beaton Supersave Inc. et al., [1983] OLRB Rep. August 1244

International Beverage Dispensers and Bartenders Union, Local 280 v. New Holiday Tavern et al., [1987] OLRB Rep. May 753

United Steelworkers of America v. Hawk Security Systems Ltd. v. Wakenhut of Canada Limited, [1993] OLRB Rep. Aug. 751

International Ladies Garment Workers' Union, v. 490296 Ontario Limited, carrying on business as Chandelle Fashions, [1982] OLRB Rep. June 828

United Food and Commercial Workers International Union v. Sunnylea Foods Limited; Maple Leaf Egg Products Ltd.; Turkstra's Eggs Ltd.; Jacob Zonneveld, [1981] OLRB Rep. Nov. 1640

Davidson - Walker Funeral Homes v. Retail Commercial and Workers' International Union, [1981] OLRB Rep. Oct. 1359

Timothy W. Smith and William Morton v. Toronto Joint Board Amalgamated Clothing & Textile Workers Union Local 1414J, [1984] OLRB Rep. Aug. 1133

The Toronto Building and Construction Trades Council v. Napev Construction Limited and Vepan Leaseholds Limited, [1976] OLRB Rep. Mar. 109

International Chemical Workers, Local 159 v. Kodak Canada Ltd., [1977] OLRB Rep. Aug. 517

National Association of Broadcast Employees and Technicians on behalf of Glenda Newhook and Radio CJYQ-930 Limited, [1979] 1 Can LRBR 180 (Dorsey)

Uncle Ben's Industries Ltd. (in Receivership) and Prince George Breweries Ltd. and Canadian Union of United Brewery, Flour, Cereal, Soft Drink and Distillery Workers, Local 300, [1979] 2 Can LRBR 126 (MacIntyre)

Canadian Brotherhood of Railway, Transport and General Workers and Victoria Flying Services Ltd., Cougar Air Incorporated, West Coast Air Services Limited, Juan Air Limited, [1979] 3 Can LRBR 216 (Foisly)

St. Lawrence Seat Authority - Transport Canada and Ponts Champlain et Jacques Cartier Incorporee v. Canada Labour Relations Board and Syndicat National des Employes du Port de Montreal, (1979) 31 N.R. 196 (Lalande)

Adam v. Daniel Roy Limitée 83 CLLC ¶14,064 (Beetz)

Island Paper Mills Ltd. v. MacMillan Bloedel Limited, Noranda Mines Ltd., Canadian Paperworkers Union, Locals 1 and 76, Pulp, Paper and Woodworkers of Canada, Local 8, (1984) Labour Relations Board of British Columbia No. 104/84 Mar. (Kinzie)

Zenon Environmental Inc. v. B.C. Government Employees' Union v. Government of the Province of British Columbia, (1992) C74/92 June (Devine)

Man of Aran Ltd. (1974), 6 L.A.C. (2d) 238

Woodbridge Hotel (1976), 13 L.A.C. (2d) 96

29. Group 4 C.P.S. submissions in respect of the notice issue focused on four themes: First, it submitted that it was a denial of natural justice to have the freeze apply to it without having received "Board Notice" because the legislation in respect of 64(3) is not specific enough to include the predecessor's notice. The Board should *not* find that the words: "the trade union continues in the same *position* in respect of the business as if the successor employer were the predecessor employer", includes the "Board notice" of the certification application received by the predecessor employer and consequently the "statutory freeze". Group 4 C.P.S. relies on cases decided by the Board which in effect say that pre-Bill 40 section 63(3) did not vest in the union all ongoing proceedings and rights under the *Act* as against the successor employer. To do so the legislature would have had to be clear and unambiguous in its wording. (See: *Davidson - Walker Funeral Homes*, *supra*; *Oxford Manor Rest Home*, *supra*; *New Holiday Tavern et al.*, *supra*; *Sunnylea Foods Limited*, *supra*; *Man of Aran Ltd.*, *supra*, and *Woodbridge Hotel*, *supra*.)

30. Second, where a party's natural justice rights are being limited, the Board in construing a section of the act must take a narrow literal interpretation. Counsel for Group 4 C.P.S. asked us to interpret section 64(3) in the following way. Section 64(3) is triggered when the predecessor employer sells the business. The section speaks to three scenarios. As a condition precedent, a trade union must be the bargaining agent for the employees of the predecessor, have applied to become their bargaining agent, or is attempting to persuade the employees to join the trade union. The word "*position*" must be construed narrowly, and relates only to the three situations described above. In respect of this application, asserted counsel for Group 4 C.P.S., the trade union continues to be the bargaining agent for the employees hired by Group 4 C.P.S. on May 1, 1993; however, the section does not include any collateral or penumbral rights that would accrue to the trade union in a situation where "Board notice" has been received only by the predecessor employer and not the successor employer. In other words, the trade union, as bargaining agent for the employees of the predecessor employer in a "statutory freeze" situation, upon the predecessor selling the business to the successor, absent "Board notice" to the successor, loses the "statutory freeze" environment because the "statutory freeze" section of the *Act* is collateral to the certification process and has nothing to with the trade union as a bargaining agent simpliciter.

31. Third, in all cases dealing with a parties legal rights, the party whose rights are being affected requires notice, so that the party has the opportunity to present its arguments to the decision-maker prior to the rendering of a decision. (See: *Re Hoogendoorn and Greening Metal Products & Screening Equipment Co. et al.*, (*supra*); *Re Bradley et al. and Ottawa Professional Fire Fighters Association et al.*, *supra*; *Per-fec-tion Insulations Limited et al.*, *supra*; *Tektron Equipment Corporation et al.*, *supra*; *Trans Continental Printing Inc.*, *et al.*, *supra*; *St. Lawrence Seaway Authority-Transport Canada*, *supra*; and *MacMillan Bloedel Limited*, *supra*.)

32. Fourth, section 64(2.2) deals directly and squarely with the notice issue. If the legislature wanted the application for certification notice and consequently the statutory freeze environ-

ment to flow through to the successor employer from the predecessor employer, it would have done so directly by including that type of notice in section 64(2.2). Section 64(2.2), submitted counsel for the responding party, limits by statute notice “flow through” to one situation. The successor employer is only bound to notice given to or received by the predecessor employer relating to bargaining for a collective agreement.

33. Counsel for USWA asserted that section 64(3) preserves the status quo in respect of the three scenario’s contemplated by the section. When a sale occurs and a trade union is the bargaining agent, has applied to be the bargaining agent, or is attempting to persuade the employees to join the trade union, the union continues in the same circumstances as if the successor employer was the predecessor employer. The section, asserted counsel for USWA, creates a continuum of consequences. Consequences do not stop flowing because one of the triggering events has not happened to the successor employer but rather only to the predecessor employer.

34. Whether or not the successor employer requires notice of the earlier proceedings, argued counsel for the USWA, depends on the construction of the section. Section 64(3) allows for the limitation of Group 4 C.P.S.’s natural justice right to notice. Section 64(3), asserted USWA, applies in the instant circumstance without the requirement of any form of notice to Group 4 C.P.S. (See: *Man of Aran Ltd.*, *supra* and *Woodbridge Hotel*, *supra*)

35. In the alternative, asserted the USWA, section 64 is not prospective. The sale of the business was deemed to have occurred on May 1, 1993 (see: section 64.2 (3)). Prior to May 1, 1993 Group 4 C.P.S. had a commercial interest, not a legal interest, consequently they were not entitled to notice of the certification proceedings. All of the cases referred to by Group 4 C.P.S. in respect of the notice issue, submitted counsel for USWA, deal with the need for notice when a legal interest is at stake. The appropriate place to deal with the alleged hardship raised by Group 4. C.P.S. because of the lack of notice, asserted Counsel for USWA, is in the commercial arena. (See: *Man of Aran*, *supra*; *Napev Construction Limited* and *Vepan Leaseholds Limited*, *supra*; *Timothy W. Smith*, *supra*; and *Kodak Canada Ltd.*, *supra*)

36. The successor rights sections of the *Act* have undergone significant evolution since they were first enacted in 1963. (see: *Labour Relations Amendment Act*, S.O. 1962-63, c. 70) The Board in *Davidson - Walker Funeral Homes*, *supra*, reviewed the legislative history at paragraphs 10 through 18 of that decision. That decision turns on the wording of then section 63 (3). At paragraphs 23 through 25 of the decision the Board in construing section 63 (3) states:

23. We cannot accept the union’s construction of the rights granted by section 63(3) of the *Act*. Its interpretation would spawn procedures that are unnecessary and which are fundamentally counter to the scheme of bargaining generally contemplated by the *Act*. In effect, counsel for the union submits that section 63(3) of the *Act*, by continuing the union’s right to bargain for the employees has, in the words of Goldenberg, continued all collective bargaining proceedings as they were before the sale. Neither the history nor the words of the section support that conclusion.

24. The limited words of section 63(3) of the *Act* and their piecemeal evolution stand in sharp contrast to the plain words that might have been chosen to impart the intention advanced by the union, and which have been chosen by the Legislature in a different context of successorship. Section 62 of the *Act*, which deals with the consequences of amalgamation or merger by which one union may become the successor of another, is unequivocal in its terms. Where there has been a merger, amalgamation or transfer or jurisdiction the section vests in the Board the authority to declare that the successor union has “acquired the rights, privileges and duties under this *Act* of its predecessor” and subsection 3 of section 63 provides:

Where the Board makes an affirmative declaration under subsection (1), the successor shall for the purposes of this *Act* be conclusively presumed to have acquired the

rights, privileges and duties of its predecessor, whether under a collective agreement or otherwise, and the employer, the successor and the employees concerned shall recognize such status in all respects.

25. The wording chosen by the Legislature to describe the rights of a union vis-a-vis the successor employer where no collective agreement is in effect are obviously more limited. The plain reading of the section leads to the conclusion that the union has what the section gives it, namely the entitlement (in our view a word indistinguishable from "right") to give notice to the new employer of its intention to bargain or make a first collective agreement or to renew and amend a previously expired collective agreement. By the inescapable words of the Act the notice so given for the purposes set out in subsection (10) section 63, has the same effect as certification.

37. The Board in *Oxford Manor, supra*, found that any freeze of the conditions of employment binding the successor employer was found to originate entirely in the notice to bargain given to the successor employer under what was then section 55(3) of the Act and extended only to conditions as they stood at that date. In concluding that section 55(3) did not vest in the union all ongoing proceedings and rights under the Act as against the successor employer the Board stated at paragraph 9 and 10:

9. Section 55(3) is the relevant section in this regard and it reads:

Where an employer on behalf of whose employees a trade union or council of trade unions, as the case may be, has been certified as bargaining agent or has given or is entitled to give notice under section 13 or 45, sells his business, the trade union, or council of trade unions continues, until the Board otherwise declares, to be the bargaining agent for the employees of the person to whom the business was sold in the like bargaining unit in that business, and the trade union or council of trade unions is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement or the renewal, with or without modifications, of the agreement then in operation and such notice has the same effect as a notice under section 13 of 45, as the case requires.

In essence the trade union, such as in the instant case, continues "to be the bargaining agent for the employees of the person to whom the business was sold" and "is entitled to give to the person to whom the business was sold a written notice of its desire to bargain with a view to making a collective agreement." Nothing in the section explicitly puts the new employer into the shoes of the previous employer so as to make all the rights and obligations relating to the collective bargaining relationship automatically attach to the new employer. The fact that the Legislature has specifically set out that the trade union shall continue to be the bargaining agent and shall have the right to serve notice to bargain on the new employer, militates against there being any additional rights or privileges from any notice to bargain which may have been served on the previous employer. This view is further fortified by an examination of section 55(2) which, in dealing with a sale of business while an application for certification or termination is before the Board provides "... person to whom the business has been sold is ... the employer for the purposes of the application as if he were named as the employer in the application. In this latter case where the Legislature intended that the new employer should fit precisely into the shoes of the previous employer it has explicitly said so. Had the Legislature similarly intended in section 55(3) we have no doubt it would have so said. Such a conclusion, in our view, is well within the rationale of the Board's decision in the case of *Hamilton Cotton Company*, [1964] OLRB Rep. July 190.

10. In our view, the notice to bargain served on the previous employer on August 11, 1980 effectively continued in effect the provisions of section 70(1) insofar as the then employer, up to the time of the sale of business, and the notice of October 28, 1980 similarly brought section 70(1) into operation on that date insofar as the respondent is concerned. During the period between October 8, 1980 when the sale was made and on October 28, 1980 when notice was served on the respondent section 70(1) was not operative. It, therefore, follows that if the lay-off of employees in order to provide work opportunity to Mrs. Fernandez constituted an alteration in

terms and conditions of employment (on which we express no opinion) it was not a change in contravention of section 70(1) of the Act.

38. The *Oxford Manor*, *supra* and *Davidson - Walker Funeral Homes*, *supra* cases contrast sharply with the decisions in *Man of Aran*, *supra* and *Woodbridge Hotel*, *supra*. In *Man of Aran* and *Woodbridge Hotel* the arbitrators found that the language of the Act supported the collective agreement “flow through” from the predecessor employer to the successor employer thereby creating obligations and liabilities on the successor employer for actions performed by the predecessor employer. However, in *Oxford Manor*, *supra* and *Davidson - Walker Funeral Homes*, *supra* the Board found that the Act had not evolved to a point where the plain wording of the section would allow the successor employer to be bound to the same notice to bargain (*Oxford Manor*), or to the same legal strike or lock-out position (*Davidson - Walker Funeral Homes*), that bound the predecessor employer.

39. The Bill 40 changes are another step in the evolution of the successor rights provisions of the Act. The idea that the successor employer should fit precisely into the shoes of the previous employer upon a sale of a business has been the topic of legislative reform since the 1960’s. The Goldenberg report on the *Construction Industry* raised this issue squarely, however successive legislative amendments to the Act, have not included the “plain words” to achieve the legislative ends contemplated by the Goldenberg report.

40. Section 64 (3) maintains the status quo between the trade union and the business during three specific types of trade union activity. The phrase, “... continues in the same position in respect of the business as if the successor employer were the predecessor employer”, is clear and unambiguous. In essence this section allows the trade union, when engaged in any of the three prescribed activities, to maintain the rights, duties and obligations afforded it under the Act in respect of the successor employer as if the successor employer was the predecessor employer. The legislature used the word “business” to guarantee a specific place to attach the trade union’s statutory rights, duties and obligations. Further, the Legislature used the word “position” to ascribe a consequential, circumstantial and spatial quality to the “flow through” of rights, duties and obligations from one employer to the next in respect of the trade union. The successor employer in buying the “business” is also buying an environment, which, under this section of the Act, includes all rights duties and obligations owed to the trade union by the business, and by the business to the trade union.

41. In our view, the Legislature limited the application of 64 (2.2) to two types of notice, because the Legislature was addressing specific “gaps” in the legislation that existed prior to “Bill 40”. (see: *Oxford Manor*, *supra* and *Davidson - Walker Funeral Homes*, *supra*) The parties were unable to advise the Board about any decision, under the pre-Bill 40 legislation, that held that a “gap” existed in respect of the “certification” statutory freeze. In our view, the Legislature, in respect of section 64 (2.2), was attempting to redress a readily identifiable “problem” with the Act. We find that, on the basis of our interpretation of 64(3), the statutory freeze environment applies to the successor employer.

42. Section 64.2 (3) of the Act allows for the deeming of a sale of a business to occur under certain prescribed conditions. This section of the Act is unique because it attaches or anchors bargaining rights to work at particular premises. This spatial quality dovetails with the intent of the Act in section 64 (3). In the case at hand, Group 4 C.P.S. stipulated that by operation of 64.2(3) it was the successor employer to Barnes-Metropol.

43. This particular section of the Act was legislated to provide protection to employees in industries that are generally known as “bid” or “tender” industries. (See: 64.2(1)) In other words,

employers in these industries are constantly “chasing” work by bidding for contracts against competitors. Section 64.2 (3) deems a sale to have occurred in a situation where the predecessor employer and the successor employer are competitors. It is not clear why either employer would ever enter into any discussion about the business prior to the “sale”. It might even be in the interest of the predecessor employer not to tell the successor employer anything about the labour relations reality at a given premises.

44. An example of the dynamic between predecessor and successor employers in these industries can be seen in the instant case. In the case at hand, the trade union begins and ends its certification drive and in fact is granted an “interim certification” after Group 4 C.P.S. has successfully tendered, but before the start date of the contract. It is clear that Group 4 C.P.S. had, prior to May 1 1993, a commercial interest in respect of the MTHA security contract in Districts #1 and #6. As well, all tenderers had some type of commercial interest in respect of the security contract being tendered by the MTHA. At the time of the tendering process, the employees in Districts #1 and #6 had not as yet exercised their right to become a member of a trade union. All tenderers “bid” the contract without any knowledge about statutory obligations under the *Act*. However, all tenderers knew or ought to have known that after June 4, 1992 (see section 64.2(5)), bargaining rights could attach to a premises and consequently could bind successor employers. As well, they knew or ought to have known that a trade union could make application for certification against the predecessor employer at any time prior to the successor employer taking over the service contract. Further, we note that the *Employment Standards Act* imposes certain obligations on successor employers. One of these obligations is to make “reasonable offers” to employees of the predecessor employer. We also note that the “bid” or “tender” documents did not address these commercial issues. It might very well be the case that all the alleged hardship suffered by Group 4 C.P.S. could have been remedied through the “tendering” documents and process itself.

45. For the foregoing reasons we dismiss the motions brought by the responding party. We direct the Registrar to canvass dates with the parties. We remain seized with this matter and the hearing will continue in respect of all outstanding issues. Further, should the parties request that a Labour Relations Officer meet with them to settle any outstanding issue, prior to the hearing dates, we direct that an Officer be appointed.

0887-90-R; 0888-90-R Service Employees’ International Union, Local 532, Applicant v. Saint Elizabeth Home Society, Ontario Ministry of Health and Heritage Green Senior Centre, Responding Parties

Abandonment - Bargaining Rights - Crown Transfer - Sale of a Business - Ministry of Health revoking nursing home’s licence, taking over nursing home and operating it for 3 years - Ministry of Health calling for and receiving proposals for licensed beds lost due to earlier revocation and awarding beds to a number of licensees, including “HG” - Board finding that part of Crown undertaking had been transferred to “HG”, that there were valid bargaining rights to be transferred and that an intermingling of employees had occurred - Board finding that predecessor’s collective agreement would have applied at time “HG” started combined operation in 1991 without a vote had *Crown Transfer Act* been applied as it should have been - Evidence not supporting submission that union had abandoned its bargaining rights - Application under *Crown Transfer Act* allowed

BEFORE: K. G. O’Neil, Vice-Chair, and Board Members J. A. Ronson and K. Davies.

APPEARANCES: *L. A. Richmond, M. Rowlinson and L. Piersanti for the applicant; Maureen Farson for the Ontario Ministry of Health; H. Keith Juriansz and Michael Neylan for Heritage Green Senior Centre.*

DECISION OF K. G. O'NEIL, VICE-CHAIR AND BOARD MEMBER K. DAVIES; April 12, 1994

1. This is an application under the Successor Rights Crown Transfer Act (The Crown Transfer Act) and of section 64 of the Labour Relations Act, for a declaration that the bargaining rights of the applicant (sometimes referred to below as the union or SEIU) bind the responding party, Heritage Green Senior Centre, referred to below as Heritage Green.

2. The events which form the background to this dispute were considered by the Board, differently constituted, in *Shalom Village*, [1992] OLRB Rep. July 827. The applicant maintains that that decision should be applied to the facts of this case, while Heritage Green argues that the facts and arguments before this panel are significantly different than those before the earlier panel and warrant a different result.

3. Most of the background facts are not disputed by Heritage Green, and we will briefly summarize that aspect of the facts. More detail can be found in the *Shalom Village* decision.

4. As a result of difficulties with respect to the care of residents, the control of the Saint Elizabeth Nursing Home (SENH) in Hamilton was taken over by the Ministry of Health (the Ministry) in 1987 under the authority of The Health Facilities Special Orders Act (HFSOA). The license under which the home had been operated was revoked in August, 1987, when SENH indicated it would not appeal the revocation of its license.

5. The Ministry ran the home for three years, and during that time, conducted itself in compliance with the collective agreement between SEIU and SENH. At one point, the issue of whether employees had become civil servants was raised between Ministry staff and the administrator of the home, but it was decided not to raise it with the employees. While running the home, the Ministry called for and received proposals to build new facilities to replace the number of licensed beds that were lost to the Hamilton-Wentworth area because of the revocation of the SENH license. As a result of the proposal process, licenses for 184 beds were awarded as follows: Shalom Village (60 beds), Southrim Enterprises (60 beds) and Heritage Green Seniors' Centre (53 beds), and the remaining number of beds were distributed to existing licensees in small numbers.

6. On the facts and argument before the Board in relation to Shalom Village, the Board found that there had been a transfer of a part of an undertaking from the Crown to Shalom Village within the meaning of the Crown Transfers Act as a result of the process which led to the issuance of the licenses described above.

7. Heritage Green relies on further facts and assertions relevant to its theory of the case, in addition to the background set out above which are summarized here:

- (a) Prior to January 9, 1991 Heritage Green Senior Centre operated a nursing home in Stoney Creek pursuant to a 34 bed license, in conjunction with an 110 apartment building for seniors from which the nursing home rented space. No employees in either operation were represented by a union. From 1983, when it started off operations in the nursing home, continuing until 1991, Heritage Green always had a signed document with an employee relations committee governing its relations with employees. (There is no suggestion that that committee was a trade union or bargaining agent under the Act).

- (b) With the revocation of the SENH license on August 25, 1987, that license ceased to exist. The process initiated after the revocation was for the issuance of new licenses. The Request for Proposals indicates the licenses contemplated are for new, additional beds for the Hamilton-Wentworth area. The Ministry of Health did not need to issue a replacement license to itself in order to operate the nursing home, nor did it do so.
- (c) On July 18, 1988 the Ministry of Health undertook to award Heritage Green a new original license to operate 53 beds to be added to its previous 34 bed license. The Minister's undertaking was subject to certain conditions, but had no qualifications concerning the revoked SENH license. No written or oral representations related to SENH, whether taking of residents or staff or even considering staff, were made. The written undertaking was qualified as to one important matter, that a new nursing home would be constructed to accommodate the newly awarded and existing beds. Heritage Green was required to put the new license for 53 beds together with the 34 it already had.
- (d) On January 9, 1991, the Ministry issued an 87 bed license, representing the new 53 beds and the earlier 34 beds, unqualified as to the revoked SENH license. Heritage Green started operating the new nursing home business in the new premises immediately after the issuance of the license. Immediately before moving to the new premises, Heritage Green had 85 employees, most of whom were part-time, with the exception of management employees.
- (e) Heritage Green was granted overbedding permission by the Ministry in the amount of 60 beds for about 6 months leading up to the opening of the new facilities to accommodate residents from SENH who would otherwise have been part of the allocation to Southrim, whose construction had been delayed. This overbedding was lowered to 25 about a week after January 9, 1991 for a period to expire 2 1/2 years later when attrition would have removed the necessity for the additional beds.
- (f) 87 beds were originally to have been filled, 34 from the previous facility, approximately 30 (all the remaining residents) from SENH and the remaining 23 from other facilities in the community and the residents' homes. From January 9 to January 31, 1991, Heritage Green filled its new facilities pursuant to its licensed and overbedded capacity with 34 from the previous Heritage Green facility, 5 or 6 from community facilities, 28 from SENH, and the remainder from Hospitals, or directly from the homes of residents.
- (g) By January 31, 1991 Heritage Green was full with 112 residents, 25 above its licensed capacity, pursuant to the overbedding permission. It was then fully staffed with 106 employees, an increase of 21 over the staffing of the previous operation. Of these 21 most were part-time. Pursuant to the employee agreement referred to above, by which Heritage Green considered itself bound, Heritage Green filled positions after internal posting and consideration of internal qualified applicants first. Some new full-time positions were filled internally. Additional positions were filled through advertising, and 8 or 9 employees from SENH came to Heritage Green by this route, 5 or 6 from the bargaining unit in question. Almost all applicants from SENH were offered positions and accepted them.
- (h) During the relevant period, there was a long waiting list for nursing home beds in the Hamilton-Wentworth area. Thus Heritage Green asserts that when it received its 87 bed license, the fact that some residents were still at SENH did not affect the value of the licence, since Heritage Green did not need them to fill the licensed capacity. It could easily have filled them off the waiting list.
- (i) Heritage Green also relies on the stipulated fact made during these proceedings, that the union has never applied for and thus never been granted representation rights from the Tribunal under *The Crown Employees Collective Bargaining Act* (CECBA).

8. The union relies on the factual findings in Shalom Village, and the fact that Ron Saps-

ford, a Ministry official involved in these proceedings gave evidence confirming certain facts, which were not accepted by Heritage Green, such as that the Ministry treated itself as a licensee during the time of its operation of SENH, including having itself inspected like any other nursing home. As well, it was Mr. Sapsford's testimony that the Ministry dealt with SEIU in good faith and considered it to be the bargaining agent of the employees in the bargaining unit. The Ministry never objected to SEIU's rights and never required any confirmation by any tribunal. In fact, asserts the union, the Ministry operated as if it were under the *Labour Relations Act*.

9. Union counsel particularly emphasized the following facts from the Shalom Village decision. At the public meeting on the request for proposals the audience was told that the Ministry expected the successful proposers to take the SENH residents, and to consider hiring SENH employees. Further, both Heritage Green and the Ministry understood that the license for 53 beds originated from the proposed closure of SENH, without which there would have been no available license. Rosemary Okimi, the former Director of Care for Heritage Green, testified that the old home was not economically viable. They were on the look-out for opportunities to expand their capacity. She answered quite candidly that Heritage Green knew they had to take the residents from SENH. These facts lead to the conclusion, in the union's submission, that the licenses were not new; they were replacement licenses. The new nursing home at Heritage Green would never have been built, would still be a plan of the Seventh Day Adventist Church, with which Heritage Green is associated, if the licenses had not been awarded. The licenses, authorizing the bed capacity which made that possible, came from SENH asserts the union.

10. Union counsel emphasizes as well that a license is something of great value. Ms. Okimi said a license was worth more than \$10,000 years ago. As well it brings funding of 50% or more per resident, depending on the level of public assistance an individual requires. Heritage Green did not have to pay for the license when it came directly from the government. The most important fact, says counsel, is that without the license there is no nursing home, you don't even plan one.

11. As to the staff, union counsel observes that Heritage Green did hire a few staff from SENH, after advertising, although they retained the right to not hire. They took the SENH staff because they needed people, but also because it was a benefit to have continuity of care, because they were familiar with the SENH residents that Heritage Green knew it was going to be accepting. There was no wholesale transfer of employees; they took whom they wanted.

12. The union also relies on the fact that the church has, as it is entitled to, a creed that explicitly includes the aspect of not wanting unions. As a member of the faith, Ms. Okimi had always known this. She testified that it was her assumption that a prairie nursing home formerly owned by the church had been sold because it was unionized. Counsel asks the Board to infer that the message will be clear to employees of the home that adherents of the faith attempt to treat staff well to avoid unions. Counsel suggests that should be considered more significant when such a view is a matter of religious belief than if it were just a business point of view.

13. With that factual background, we will deal with each of the areas of argument, in turn.

I

14. Was the operation of the nursing home by the Ministry an undertaking?

15. The respondent's position was that the operation of the nursing home by the Ministry was not an undertaking within the meaning of the *Crown Transfers Act*, and thus the first precondition for successor rights under that Act could not be met. The parties to the *Shalom Village* decision agreed that the operation by the Ministry was an undertaking under the *Crown Transfer Act*.

Heritage Green argues that it was not, and on that fundamental basis the earlier decision should not be applied.

16. Counsel urged us to accept the reasoning of the minority in *Shalom Village*, which was that the term Crown undertaking should not be given a significance beyond the Ministry's mandate under the HFSOA, which was temporary, and did not extend to a protracted running of the nursing home. The Ministry did not, the minority found, operate the nursing home in their own right as owners or proprietors as in other Crown Transfer cases cited in the majority decision.

17. The word "undertaking" is defined in the *Crown Transfers Act* as follows:

"undertaking" means a business, enterprise, institution, program, project, work or a part of any of them. ("enterprise")

18. The applicant relied on the discussion of the meaning of undertaking in *Parnell Foods Limited*, [1992] OLRB Rep. Dec. 1164. Undertaking in the applicant's submission is a broad term referring to a going concern, an economic activity, not just a collection of assets.

19. The undertaking here is, in the union's submission, the management and operation of the SENH for the purpose of providing care until alternative accommodation could be found for the residents remaining, in furtherance of the Ministry's role under the HFSOA.

20. Relevant provisions of the HFSOA include the following:

2. The purposes of this Act are:

1. To enable the Minister to act expeditiously to prevent, eliminate or reduce harm to any person, an adverse effect on the health of any person or impairment of the safety of any person caused or likely to be caused by the physical state of a health facility or the manner of operation of a health facility.
2. To enable the Minister to act expeditiously where the conduct of a licensee or of an officer or director of a corporate licensee affords reasonable grounds for belief that the health facility is not being or is not likely to be operated with competence, honesty, integrity and concern for the health and safety of persons served by the health facility.

7.-(1) Where the licence for a health facility is suspended under this Act and the Minister is of the opinion that the health facility should continue in operation in order to provide temporarily for the health and safety of persons in the community served by the health facility, the Minister by a written order may take control of and operate the health facility for a period not exceeding six months.

(2) Where the Minister takes control of and operates a health facility under subsection (1), the Minister has all the powers of the licensee of the health facility and the Minister may appoint one or more persons to conduct, manage, operate and administer the health facility and each person so appointed is a representative of the Minister.

(3) The Board, upon application with notice by the Minister, by order may extend the period of time during which the Minister may retain control of and operate the health facility for successive periods of not more than six months each, where the Board is satisfied that a hearing or an appeal has been commenced under this Act and the proceedings have not been finally disposed of and the Minister continues to be of the opinion that the health facility should continue in operation in order to provide temporarily for the health and safety of persons in the community served by the health facility.

(4) An order under subsection (1) or (3) takes effect immediately and is final and binding on the licensee.

(5) An order under subsection (1) or (3) continues in force,

- (a) until terminated by the Minister;
- (b) where the licence for the health facility has been suspended under this Act, until the suspension is removed; or
- (c) where the Minister has proposed under this Act to revoke the licence for the health facility, until the time for requiring a hearing or an appeal has expired or until the proceedings have been finally disposed of and, where persons are cared for in the health facility, until every person cared for in the health facility has found alternative accommodation.

21. Under the *Nursing Homes Act*, Ministry officials are required to oversee the running of nursing homes and the transition period where licenses are revoked. See, in particular section 19 [formerly section 12] which provides as follows:

19.-(1) Where the licensee's licence is revoked and the revocation becomes final or where the nursing home is otherwise being operated without a licence, the residents or their representatives shall arrange to vacate the premises as soon as it is practicable and the Director shall assist in finding alternative accommodation.

(2) For the purposes of arranging alternative accommodation under subsection (1), the Minister may, despite sections 25 and 39 of the *Expropriations Act*, immediately occupy and operate the nursing home or arrange for the nursing home to be occupied and operated by a person or organization designated by the Minister, for a period not exceeding six months, but all the rights of the licensee under that Act, except the right to possession, are preserved.

(3) Where the licensee's licence is revoked and the revocation becomes final or where the nursing home is otherwise being operated without a licence, the licensee and the administrator shall hand over to the Minister, or a person designated by the Minister, all the records that are in their possession or control and that pertain to the residents of the nursing home.

As well, section 6 of the *Ministry of Health Act* provides that it is the duty of the Ministry of Health to maintain nursing homes.

22. We have considered the broad meaning of the word undertaking and the fact that the running of the nursing home, which went on for three and a half years, was in furtherance of statutory mandates given to the Ministry itself under the *Ministry of Health Act*, the *Nursing Home Act* and the HFSOA. It was at the very least part of a program or project of the Ministry, terms found in the definition of undertaking. We have concluded that, on the facts of this case, the preferable view is that the operation of the nursing home by the Ministry was part of a Crown undertaking, and we so find.

II

23. Was there a transfer of the Crown undertaking? Transfer is defined in the *Crown Transfers Act* as follows:

“transfer” means a conveyance, disposition or sale.

24. Heritage Green argued that no transfer occurred from SENH or the Crown when Heritage Green was issued its license for 53 beds. Rather they argue that what took place was the issuance of a new license, unconnected to SENH.

25. Counsel for Heritage Green submits that any attempt to relate the issuance of licenses to Heritage Green back to the no longer existent SENH licenses confuses the issue, and mixes the

questions which would exist under the *Labour Relations Act* with the proper one under The Crown Transfer Act. Counsel says there were two distinct transfers if any. Counsel says that in answering the question as to whether there was a transfer of part of an undertaking from the Crown to Heritage Green, in 1991, it does not matter that SENH had those beds in 1987. Counsel replies to the union's reliance on *Parnell Foods*, cited above, saying that nothing at all in the way of an economic vehicle was transferred from the Crown.

26. Counsel for Heritage Green referred to the portion of the *Shalom Village* decision where the events surrounding the issuance of the licenses to Shalom Village, Heritage Green and others, were compared to a commercial transaction involving the sale of a nursing home license. Counsel did not accept the validity of the comparison and detailed the differences between a usual commercial transaction and the process involved in this case:

- there was no right of anyone to designate who would be the recipient as there would have been with a commercial vendor, where the surrender of the license would be conditional on the issuance to the purchaser. And there was no license for SENH to surrender at the time of the issuance of the new license to Heritage Green.
- there was no commercial transaction at all here, and no involvement of any third party. There was a 3 1/2 year hiatus between the time when SENH's license was revoked and ceased to exist and the time Heritage Green's began to exist. No such hiatus would occur in a commercial transaction.

27. By contrast, union counsel relies on the finding in *Shalom Village* that there was a transfer. He submits that in terms of the transfer of this undertaking, what was transferred was the entire core of the nursing home operation: the license and the residents. Responsibility for the care of the residents, together with the funding for those residents was passed to the new licensees. Three new nursing homes were built as a direct result of the promises of the licenses involved here.

28. Union counsel argues that in the nursing home field, the Board has recognized the transfer of the license as the key element. Counsel refers to both *Shalom Village* and decisions such as *Parnell Foods Limited*, cited above and *Riverview Manor*, [1983] OLRB Rep. Sept. 1564, for a discussion of the Board's efforts to interpret the section in a manner sensitive to the particular business sector involved.

29. In answering Heritage Green's argument that the license, the piece of paper possessed by SENH, is gone, union counsel refers to the fact that a change of license always has to go through the Ministry and is never handed over the table. The jurisprudence has not found that a business disappears when the vendor surrenders its license to the Ministry. It survives the process necessary to get the new license issued to the purchaser.

30. Union counsel submitted that whether or not the staff is transferred is irrelevant, because one could just avoid successor rights by refusing to hire the employees of the predecessor. However, the union argues that on the facts in this case, the fact that Heritage Green hired some of the SENH employees tends to reinforce the idea that the business came from SENH, through the Ministry. The SENH staff were a benefit to Heritage Green in order to provide continuity of care to the SENH residents. The Ministry was just the vehicle.

31. We have carefully considered whether we should depart from the Board's finding in *Shalom Village* (see paragraph 85) that the tendering process involved in the closing of SENH fell within the definition of a transfer in the *Crown Transfers Act*, and that what was transferred was a portion of an asset which the Board has said is the essence of a nursing home business. The main

arguments made to us against this finding are that the transaction in issue here does not resemble a commercial transaction and that nothing of an economic vehicle was transferred.

32. Assuming for the sake of argument that the transfer of the license does not resemble a commercial transaction, the fact that part of the running of the nursing home passed from the Ministry to Heritage Green by means other than a commercial transaction is not determinative given the definition of transfer in the *Crown Transfers Act*. To find otherwise would be to import into the definition some requirement that the conveyance be for financial consideration or follow some prescribed commercial expectation, which we have no power to do. We find that the words “conveyance” and “disposition” in particular are sufficiently broad to cover the issuance of the license to Heritage Green and the transfer of the responsibility to care for the patients together with access to funding therefor, from the Crown to Heritage Green.

33. As to the idea that nothing passed from the Crown to Heritage Green which could constitute the kind of economic vehicle referred to in *Parnell Foods*, we do not agree with Heritage Green’s submission. In the circumstances, where the Crown was actually operating the Home, it transferred not only a portion of the license which is an essential part of the economic vehicle of a nursing home. At the same time, the patients, responsibility for them, and the right to substantial funding also passed. (This is not to be taken as a suggestion that a transfer of residents between institutions without more, constitute a Crown Transfer). As well, we do not consider the fact that Heritage Green could have undoubtedly filled its new beds without the transfer of the residents of the former SENH, which the Ministry was running, to be terribly significant. The fact is they *did* come from there. As to whether or not the Crown got anything in return (which may not be relevant in any event) we view the relief from the responsibility of providing the care of the residents as a not insignificant consideration.

34. For the above reasons, the arguments made do not convince us that a finding similar to that in *Shalom Village* should not be made on the somewhat different, but extremely similar, facts before us. Thus, we find that the same process which resulted in a transfer of part of a Crown undertaking to *Shalom Village* also resulted in the transfer of part of a Crown undertaking to Heritage Green.

III

35. Were there valid bargaining rights to be transferred? Heritage Green argues in the further alternative, that SEIU was not a bargaining agent as that term is defined in the *Crown Transfers Act* for the purpose of transfers from the Crown to employers. Thus it takes the position that there was no valid and enforceable collective agreement with the Crown, as SEIU was not capable of being a valid partner to a collective agreement with the Crown. It would follow then that Heritage Green is not bound by the document alleged to be a collective agreement between the Crown and SEIU; no successor rights would flow.

36. Further statutory provisions referred to in this portion of the argument not already set out above include the following:

From the Crown Transfer Act

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“Board” means the Ontario Labour Relations Board; (“Commission”)

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“Tribunal” means the Ontario Public Service Labour Relations Tribunal; (“Tribunal”)

2.-(1) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has a collective agreement with the Crown in respect of employees employed in the undertaking, the employer is bound by the collective agreement as if a party to the collective agreement until the Board declares otherwise.

(3) Where an undertaking is transferred from the Crown to an employer and a bargaining agent has been granted representation rights under any Act and has given or is entitled to give written notice of desire to bargain to make or renew a collective agreement in respect of employees employed in the undertaking, the bargaining agent continues, until the Board declares otherwise, to be the bargaining agent in respect of the employees and is entitled to give to the employer written notice of desire to bargain to make or renew, with or without modifications, a collective agreement, as the case requires.

3.-(1) Where an undertaking is transferred from an employer to the Crown and a bargaining agent has a collective agreement with the employer in respect of employees employed in the undertaking, the Crown is bound by the collective agreement as if a party to the collective agreement until the Tribunal declares otherwise.

(2) Where an undertaking is transferred from an employer to the Crown while an application is before the Board for certification or termination of bargaining rights in respect of employees employed in the undertaking, the application shall be transferred to the Tribunal and the Crown is the employer for the purposes of the application as if named as the employer in the application until the Tribunal declares otherwise.

(3) Where an undertaking is transferred from an employer to the Crown and a trade union or council of trade unions has been certified by the Board as bargaining agent or has given or is entitled to give written notice of desire to bargain to make or renew a collective agreement in respect of employees employed in the undertaking, the bargaining agent continues, until the Tribunal declares otherwise, to be the bargaining agent in respect of the employees and is entitled to give to the body representing the Crown or to the Crown, as the case requires, written notice of desire to bargain to make or renew, with or without modifications, a collective agreement, as the case requires.

7.-(1) An application may be made to the Tribunal or to the Board and,

- (a) the Tribunal may declare whether or not a trade union or council of trade unions qualifies as an employee organization under the *Crown Employees Collective Bargaining Act*; and
- (b) the Board may declare whether or not an employee organization qualifies as a trade union or council of trade unions under the *Labour Relations Act*.

(2) Where the Tribunal is not satisfied that the trade union or council of trade unions is so qualified or the Board is not satisfied that the employee organization is so qualified, the Tribunal or the Board, as the case may be, may specify the steps necessary to so qualify and when satisfied that the steps have been taken,

- (a) the Tribunal shall declare that the trade union, council of trade unions or the successor of either of them is so qualified; or
- (b) the Board shall declare that the employee organization or its successor is so qualified.

(3) A trade union, council of trade unions or successor of either of them that is declared by the Tribunal to be so qualified shall be deemed to have been qualified as an employee organization under the *Crown Employees Collective Bargaining Act* from and including the day of the transfer to the Crown of the undertaking to which the declaration relates.

(4) An employee organization or its successor that is declared by the Board to be so qualified

shall be deemed to have been qualified as a trade union or council of trade unions under the *Labour Relations Act* from and including the day of the transfer to the employer of the undertaking to which the declaration relates.

10. For the purposes of the *Crown Employees Collective Bargaining Act* and the *Labour Relations Act*, notice given under this Act of desire to bargain to make or renew, with or without modifications, a collective agreement or a declaration by the Board or the Tribunal that an employee organization, trade union or council of trade unions is the bargaining agent in respect of the employees in a bargaining unit has the same effect as the granting of representation rights or certification as bargaining agent.

From the *Crown Employees Collective Bargaining Act*:

• • •

“employee organization” means an organization of employees formed for the purpose of regulating relations between the employer and employees under this Act, but does not include such an organization of employees that,

- (a) receives from any of its members who are employees any money for activities carried on by or on behalf of any political party,
- (b) handles or pays in its own name on behalf of members who are employees any money for activities carried on by or on behalf of any political party,
- (c) requires as a condition of membership therein the payment by any of its members who are employees of any money for activities carried on by or on behalf of any political party,
- (d) supports or requires its members who are employees otherwise to support any political party, or
- (e) discriminates against any employee because of age, sex, race, national origin, colour or religion; (“association d’employés”)

• • •

6. The Tribunal shall not grant representation rights to any employee organization in the formation or administration of which there has been or is, in the opinion of the Tribunal, participation by the employer or any person acting on behalf of the employer of such a nature as to impair the employee organization’s fitness to represent the interests of employees in the bargaining unit.

NEGOTIATION OF AGREEMENTS

7. Upon being granted representation rights, the employee organization is authorized to bargain with the employer on terms and conditions of employment, except as to matters that are exclusively the function of the employer under subsection 18(1), and, without limiting the generality of the foregoing, including rates of remuneration, hours of work, overtime and other premium allowance for work performed, the mileage rate payable to an employee for miles travelled when he or she is required to use his or her own automobile on the employer’s business, benefits pertaining to time not worked by employees including paid holidays, paid vacations, group life insurance, health insurance and long-term income protection insurance, promotions, demotions, transfers, lay-offs or reappointments of employees, the procedures applicable to the processing of grievances, the classification and job evaluation system, and the conditions applicable to leaves of absence for other than any elective public office or political activities or training and development.

8.-(1) Upon being granted representation rights under section 4, the employee organization may

give the employer written notice of its desire to bargain with the view to making a collective agreement.

(2) The parties shall meet within fifteen days from the giving of the notice or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort to make a collective agreement.

37. Counsel for Heritage Green observes that the *Crown Transfers Act* applies to both transfers from a “private sector” employer to the Crown and transfers from the Crown to another employer. When one looks at how the statute defines its terms, counsel for Heritage Green maintains it is important to keep that in mind. The definition of bargaining agent is as follows:

“bargaining agent” means an employee organization that has representation rights under the *Crown Employees Collective Bargaining Act* or a trade union or council of trade unions that is certified as a bargaining agent under the *Labour Relations Act*;

38. However, the *Crown Employees Collective Bargaining Act* (CECBA), does not apply to employers other than the Crown, and it defines “bargaining agent” to mean “an employee organization that has representation rights under this Act, i.e. CECBA. Counsel for Heritage Green argues that the *Crown Transfers Act* should be read consistently with the CECBA definition. This would mean that when it refers to a bargaining agent dealing with the Crown, it should be taken to mean only an organization that has been granted representation rights under CECBA. If this is applied when deciding if the agreement which the Ministry and SEIU treated as a collective agreement is one which flows with the transfer we have found above, the result would be that it is not a valid collective agreement under the *Crown Transfers Act*.

39. The *Crown Transfers Act* defines “collective agreement” as follows:

An agreement in writing between the Crown or an employer and an employee organization, trade union or council of trade unions covering terms and conditions of employment.

Counsel for Heritage Green submits that when dealing with the Crown, this wording refers to an agreement with an employee organization under CECBA, and when dealing with any other employer, it means an agreement with a trade union under the *Labour Relations Act*. Counsel says that the term employee organization has no meaning under the *Labour Relations Act* and “union or council of trade unions” has no meaning under CECBA. The employer’s position is that collective agreement as defined in the *Crown Transfers Act* does *not* mean an agreement between the Crown and a trade union or between an employer and an employee organization, because those terms do not apply; they would be a statutory mismatch. Thus, unless SEIU had been granted representation rights under CECBA, it was not capable of entering into a valid collective agreement with the Crown.

40. Counsel for Heritage Green argues that section 2 of the *Crown Transfers Act* supports his interpretation of the term “bargaining agent”, in that it uses the same word as in CECBA when it could have used the word trade union. Counsel argues that the sections of CECBA (6 and 7) that enable an employee organization, council of trade unions or a trade union to apply for a declaration that they have successor rights would not have been put there if it was intended that a union that was not a bargaining agent as defined in CECBA had been contemplated. Counsel argued that, for example, if OPSEU was the bargaining agent on a transfer from the Crown to an employer other than the Crown, there would be no need for OPSEU to make application. The reverse would be true concerning a trade union or council of trade unions applying to the Public Service Labour Relations Tribunal (the Tribunal). In sum, counsel argues that section 2 of the *Crown Transfers Act* requires that the applicant be a bargaining agent with rights granted under

CECBA. Since the evidence is clear that no such rights have been granted, Heritage Green argues that the applicant does not qualify for successor rights.

41. Counsel further observes that SEIU has had six years since they knew of the Crown's involvement to apply for representation rights, but they have never applied or been granted representation rights. Even if one granted that both the Ministry and the union thought they were operating under the *Labour Relations Act*, it does not advance the argument in counsel's submission. In any event, counsel suggests that Ministry officials were aware that the employees might have become Crown employees. Further, counsel observes there is no reference to voluntary recognition in CECBA as there is in the *Labour Relations Act*.

42. Underlying the above is the submission that for an employee organization to have rights under CECBA, it has to be granted them. A deal with the Crown is not enough. Counsel for Heritage Green suggests there are a number of very good reasons for that expressed throughout CECBA. For instance, the concept of employee organization excludes certain organizations, such as those who give money to political parties or discriminate against employees on various grounds such as race. Counsel says these are two essential reasons for giving the Tribunal the right to decide who should have bargaining rights and that it should not be enough for a union to just come and make a deal with the Crown. Counsel says one can assume that SEIU chose not to apply for representation rights because they would have had to notify OPSEU if they did.

43. Counsel suggests that a reading of CECBA in its entirety reinforces the notion that the Tribunal was intended to have control over the process, which is another reason why employee organizations have to get their bargaining rights from the Tribunal. Furthermore, a collective agreement under CECBA looks quite different from one under the *Labour Relations Act* because of the various statutory provisions as to its contents.

44. It is the Ministry's submission, adopted by the applicant, that the relevant legislation does not remove the option of voluntary recognition. Ministry counsel referred to section 3(1) of the *Crown Transfers Act*. She said the critical words are "until the Tribunal declares otherwise". She also refers to section 3(3) to support the idea that the statute contemplates a process that may take place without the intervention of a quasi-judicial body. Counsel observes that section 6(1)(a) provides that a trade union shall not exercise representation rights unless it qualifies under CECBA. It does not say unless it "is granted" rights. Counsel describes what follows as a mechanism for sorting out challenges. If someone challenged whether SEIU was a bargaining agent under CECBA, then under section 7 an application may be made. However, it is not mandatory that an application be made before any normal bargaining takes place.

45. Counsel points out that the sections which contain the words "upon being granted representation rights", sections 7 and 8, appear to refer to new bargaining agents and the rest of CECBA supports the argument that it is not the only option. Ministry counsel refers to section 10 as critical, and in line with section 3(3). Section 10 provides that a notice to bargain has the same effect as a declaration by the Tribunal that an organization has representation rights. It clearly contemplates the option of an organization not proceeding to the Tribunal. This makes sense, counsel submits, as it contemplates an orderly continuation of collective bargaining with access to a tribunal if disputes arise, including disputes as to whether or not the union qualifies as a bargaining agent under CECBA. Counsel describes this as a reasonable protocol, as there is no sense requiring parties to litigate if they do not have a dispute. When SENH was taken over, there was an orderly transition from SENH to the Ministry. They recognized SEIU and voluntarily negotiated renewal of the collective agreement.

46. Union counsel adopted Ministry counsel's submissions on this point and made some fur-

ther points. The union says that under the *Crown Transfers Act*, “bargaining agent” is a neutral term since when the bargaining agent goes to a new employer, it does not change its status while it is in transition. Union counsel suggests the definition means exactly what it says: either or both of a union under the *Labour Relations Act* or an employee organization under CECBA.

47. The union argues further that it has perfectly good status under CECBA, since the Crown is bound until the tribunal declare otherwise. No one needed the Tribunal to declare anything, because the parties were content. The employer accepted SEIU and the successor is “stuck” with that, in counsel’s submission; what the Ministry did was entirely practical and in furtherance of good labour relations. Counsel underlines that if the Ministry had only been operating SENH for a short period, as it would have preferred, it would have made no sense to go to the Tribunal to rule on a very temporary situation. Counsel further observes that a union only has to qualify as an employee organization and that if you do not qualify, the tribunal allows organizations to take steps to qualify. (See section 7(2) of the *Crown Transfer Act*). Referring to *Hughes Boat Works Inc.*, 79 CLLC para. 14,230, counsel submits that were there are two possible interpretations, the Board should emphasize what is practical and encouraging of settlements rather than litigation.

48. As to the differences between CECBA and the *Labour Relations Act* as to the contents of the collective agreement and permissible bargaining subjects, counsel notes that there is nothing to indicate any violation of CECBA. As to the deemed provisions, they are present automatically, whether they appear in writing in the collective agreement or not.

49. The union argues that Heritage Green’s argument should be rejected as not legally sound, and because the successor should not be in a better position than the predecessor. Despite having had notice of SEIU’s claim since 1988, Heritage Green never raised this issue until 1993, at which time there was no point in going to the Tribunal as SENH was long closed.

50. Counsel for Heritage Green argues in reply that the sections (such as 3 and 10) on which the other two parties rely in the *Crown Transfers Act* should only be held to apply once SEIU is granted rights by the Tribunal under CECBA.

51. We have carefully considered the arguments of the parties and are of the view that the interpretation advanced by the Ministry and the union is the more sustainable interpretation of the statutes read together. In addition to the points made by counsel, we would add that, within the *Crown Transfers Act*, where the legislature wished to make a distinction between a union and an employee organization as opposed to the term bargaining agent, which serves for both, it did so, as in section 7. When the plain meaning of the words suggests that it serves for both, and the distinction is made within the four corners of the statute as desired, we do not find sufficient basis for coming to the conclusion that Heritage Green urges upon us. We also agree that where there is a correct interpretation that avoids a finding that parties must litigate where there is no issue between them, it is the preferable one.

52. Thus, we are of the view that there were valid bargaining rights to be transferred. They did not expire because the Tribunal was not asked to confirm them. Further, even if the collective agreement did not conform to the requirements of CECBA, on which we make no finding, we are of the view that it would not affect the existence of bargaining rights.

IV

53. Was there Intermingling? This question is relevant because of the provisions of section 5(1) of the *Crown Transfers Act* which provides as follows:

5.-(1) Despite section 2, where an undertaking is transferred from the Crown to an employer who intermingles the employees employed in the undertaking immediately before the transfer with employees employed in one or more other undertakings carried on by the employer or an undertaking is transferred from an employer to the Crown and employees employed in the undertaking immediately before the transfer are intermingled with employees employed in other undertakings of the Crown and an employee organization, trade union or council of trade unions that is the bargaining agent in respect of employees employed in any of the undertakings applies to the Board, in the case of the transfer of the undertaking to an employer, or to the Tribunal, in the case of the transfer of the undertaking to the Crown, the Board or the Tribunal, as the case requires,

- (a) may declare that the employer or the Crown, as the case may be, is no longer bound by the collective agreement referred to in section 2 or 3;
- (b) may determine whether the employees concerned constitute one or more appropriate bargaining units;
- (c) may declare which employee organization, trade union or council of trade unions shall be the bargaining agent in respect of each such bargaining unit; and
- (d) may amend, to such extent as the Board or the Tribunal considers necessary,
 - (i) any certificate issued to any trade union or council of trade unions,
 - (ii) any bargaining unit defined in any collective agreement,
 - (iii) any unit of employees determined by the Tribunal to be appropriate for collective bargaining purposes in respect of any of the undertakings, or
 - (iv) any unit of employees that is designated by the Lieutenant Governor in Council as an appropriate bargaining unit for collective bargaining purposes in respect of any of the undertakings.

54. Heritage Green argues that there has been an intermingling of bargaining unit employees in an exact business carried on by it immediately before the transfer, which was operated without a union, and that the Board is entitled to and should declare that Heritage Green is no longer bound by the collective agreement. Counsel refers to and relies on *Caressant Care*, [1984] OLRB Rep. Aug. 1060. Although that decision was made under the successor rights provisions of the Labour Relations Act, counsel urges us to find that the situation is comparable. In that case a new facility had been opened and there were a number of people in the nursing home immediately before the transfer. The sale to the purchaser was such that a number of the employees of the vendor ended up “mixed up” with the employees of the purchaser and intermingling was found.

55. The union’s argument was that the fact that 6 or 7 employees from SENH went to Heritage Green does not amount to intermingling under the Act. Counsel submits they were hired as any one would be hired “off the street”. The fact that they had worked for SENH was simply a factor in their favor. The employer did not purport to apply the collective agreement in considering their applications, and their hiring was not in accordance with the collective agreement.

56. Counsel for the union submits that the interpretation of intermingling urged by Heritage Green should be rejected, because if the hiring of one person from the old bargaining unit triggers a finding of intermingling and a vote, the numbers could be arranged to always be in

favour of the employer. Under those circumstances, the union would be better off if no one was hired, and that is not a result the Board should encourage.

57. Union Counsel refers to *Emrick Plastics Inc.*, [1982] OLRB Rep. June 861 at para. 17 for the proposition that the employer cannot pick and choose employees from the predecessor business. Counsel suggests that for true intermingling to have occurred, Heritage Green would have had to take all the employees and apply the collective agreement to them. Counsel argues that the employer's own decision to "pick and choose" should not be allowed to defeat the union. Counsel refers to para. 32 of *Caressant Care*, to the effect that it is only where intermingling is found that the Board will exercise its discretion.

58. Counsel argues that on January 9, 1991, a new Heritage Green business started, not the old one. They took employees from their old business and hired off the street. Counsel submits that for the Board to find that to be intermingling, is to say that a person hired off the street is from the old business. The union submits that they were all new to the new Heritage Green.

59. In reply on this issue, counsel for Heritage Green refers to the analysis in *Caressant Care*, cited above, which emphasizes that intermingling does not require the presence of the former employees as individuals. What it refers to is the employees of the two businesses, whoever they might be. He emphasizes that it is the practical problem of running two integrated businesses that underlies the intermingling provisions of both the *Crown Transfers Act* and the *Labour Relations Act*. Counsel urges us to find that even if Heritage Green had hired no employees from SENH, there was an intermingling because there was a pre-existing business of the exact same type as the one transferred.

60. The Board is of the view that these facts are analogous to *Caressant Care*, and that an intermingling of the employees of two businesses has occurred within the meaning of the *Crown Transfer Act*. This is true, even though it is worded somewhat differently than the *Labour Relations Act* and may in fact require the presence of employees employed in the previous business. As in *Caressant Care*, the fact that the successor employer did not acknowledge the collective agreement at the time of the transfer, and thus did not employ SENH employees as a matter of right, does not change the fact that it did intermingle the two businesses and at least some of their employees at the time of the transfer. The fact that we are now at least three years past the transfer, and that the employees from SENH did not move in numbers proportional to the number of beds for which the license was transferred, poses remedial problems with which we will deal below, but it does not mean that no intermingling occurred. See also *Kitchener-Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130 at para. 44, where a finding of intermingling (albeit on the agreement of the parties) followed the transfer of a department from one hospital to another, which had previously also had a similar department, arguably an analogous situation.

V

61. What should the remedy be? Heritage Green argued that if the Board found a transfer and intermingling, there were grounds for the Board to find that the collective agreement did not apply.

62. Heritage Green submits that the evidence is unclear as to the number of employees at SENH, and as to the date of the alleged transfer. Counsel suggests that the transfer cannot be said to have occurred when the license issued in January, 1991. At that time there were only 30 residents at SENH, which would indicate there were not many employees. Some took severance packages and were discharged prior to the time Shalom Village took on residents from SENH on or after October 29, 1990 (See para. 50 of the *Shalom Village* decision which states that at that point

in time there were eighty-nine residents left at SENH.) As of January 9, 1991, the evidence shows Heritage Green had 85 employees, some of whom were managerial. The evidence does not establish how many employees were in the bargaining unit at SENH immediately before the transfer or how many would be in a similar bargaining unit at Heritage Green.

63. Relying on *Caressant Care*, cited above, employer counsel says that the appropriate way to analyse the numbers is to look at the bargaining unit in the vendor's organization and compare it with the number of employees in the purchaser's business after the sale. Counsel suggested that it is clear that the overwhelming preponderance is of Heritage Green's employees. Counsel says that the jurisprudence is clear that where the numbers are not close, the Board should declare, pursuant to section 5 of the *Crown Transfers Act*, that Heritage Green is not bound.

64. Alternatively, we are urged to hold a representation vote to determine if Heritage Green should be bound by SEIU's collective agreement.

65. The union's position on remedy was that the collective agreement should apply as of the date of transfer and no vote should be held. It argues that a vote is a completely discretionary remedy and none should be awarded because of the circumstances of this case. These include the extreme passage of time as the parties left this matter in abeyance pending the outcome of the *Shalom Village* matter. After the *Shalom Village* decision issued, settlement discussions and various delays to accommodate the schedules of the three parties followed. The union says that a vote would now be a foregone conclusion. There has been no contact since 1991 with the employees because of these proceedings. Counsel argues that the union should not be penalized by the passage of time. Counsel maintains that the most fair result in the circumstances is to order that Heritage Green was bound by the expired collective agreement, and that SEIU has the right to serve notice to bargain. If the employees are not content with the union's representation, they can commence proceedings to terminate those rights, submits counsel. Counsel says that the employer and the union never had an opportunity to work things out at Heritage Green because of the position that it was not bound by the collective agreement. Counsel says that a vote should only be ordered on the basis of some active presence of the union in the workplace. In these circumstances, without the transfer of the collective agreement or employees from SENH in numbers pursuant to its provisions, that context does not exist, as a result of the employer's actions. Counsel refers to *Caressant Care* and *Emrick Plastics*, cited above, on those points as well.

66. As to the relative numbers, counsel for the union argues that because of the unusual circumstances of these facts no one ever knew when the transfer actually occurred but Heritage Green knew of SEIU's claim since at least December, 1989. If the construction of the expanded Heritage Green facilities had been ready earlier, the numbers would have been different too. In any event, there are more employees attributable to the transferred business than to the old Heritage Green operation. The union submits that these too are unusual facts which are not adequately addressed by a vote.

67. The union's last point deals with the Seventh Day Adventist creed. Counsel submits that where the employer opposes unions as a matter of religious belief, a vote would be a foregone conclusion. He observes that the employer did not attempt to rebut Ms. Okimi's presumption that the prairie home owned by the Church was closed because it was unionized. Counsel queried: what employee would vote to close the home?

68. Heritage Green asked us to find that there was no evidence of anti-union animus before the Board. Counsel underlined that Ms. Okimi's assumption that a Saskatchewan institution was sold because it was unionized was not based on personal knowledge. The only evidence was that the Church prefers not to deal with a union, which should not be found to constitute anti-union

animus. Thus, Counsel says that the Board should not give effect to the union's submissions on a representation vote, especially since the employer is not permitted to do anything to affect the outcome of the vote. Counsel also referred to evidence showing there was no anti-union animus, such as the fact that the employer interviewed and offered jobs to almost all staff from SENH who applied.

69. Heritage Green's pleadings suggest that the character of the business was changed such that bargaining rights should be terminated. This was not pursued in argument, and there is no basis for such a finding within the Board's jurisprudence.

70. The purpose of a remedy here should be, as far as possible, to put the parties in the positions they would have been had the Act been applied as we have found it should be. In this respect we find, on the facts of this case, that the appropriate way to determine the balance from a labour relations point of view is to compare the proportion of the business from the successor business as opposed to that from the predecessor at the time the successor Heritage Green started the combined operation (January 9, 1991). We find it appropriate to count the total licensed bed capacity at that time, including the overbedded capacity, which Heritage Green had for a period of two and half years after that. Comparing this to the bed capacity prior to the transfer, produces an appropriate proportion from which one can approximate the proportion of staff which would have been from one business as opposed to the other. This results in 112 total capacity, compared to 34 before the transfer, indicating 78 came from the transfer. On those numbers, the Board finds that the collective agreement would have applied at the date of the transfer January 9, 1991, without a vote. Given its expiry, the union has the right to give notice to bargain.

71. Given our findings above, it is unnecessary to deal with the parties submissions on successor rights under the *Labour Relations Act* or other points made in the parties' pleadings, with the exception of Heritage Green's assertion that by virtue of delaying until December 21, 1989 in asserting its claim to successor rights and or by its members accepting severance packages, SEIU abandoned its bargaining rights. We do not find a basis in the evidence for such a finding, given that it was actively engaged in representing its members up until that time, as evidenced by its dealings with the Ministry.

72. For the reasons set out above, the application is allowed. The dissent of Board Member J. A. Ronson will follow at a later date.

3402-93-R United Food & Commercial Workers International Union, AFL, CIO, CLC, Applicant v. Highland Packers Limited, Responding Party

Certification - Practice and Procedure - Representation Vote - Union objecting to results of representation vote on grounds that certain individual ("A") ought not to have voted and that certain other individual ("B") was not on voters list, but ought to have been - Union and employer making full written representations in respect of objections - Union seeking oral hearing - Board satisfied that oral hearing unnecessary to determine objections raised by union - Board concluding that, having agreed to count A's ballot at the time of the vote, union ought not to be permitted to resile from its agreement and challenge A's status after ballots were counted - Board similarly concluding that having agreed to composition of voters' list, and having certified that all eligible voters had had

opportunity to vote, union ought not to be permitted to assert that B was eligible voter - Board declining to order second representation vote - Certification application dismissed

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *J. A. Ronson* and *R. R. Montague*.

DECISION OF THE BOARD; April 20, 1994

1. This is an application for certification. By decision dated February 1, 1994, the Board (differently constituted) ordered that a representation vote be taken of the employees of the responding party (hereinafter "the employer") in the bargaining unit. The representation vote was held on February 24, 1994. Prior to the last day for the filing of statements of desire to make representations regarding the taking of the vote, the applicant wrote to the Board and raised two objections with respect to the taking of the vote. Counsel for the employer has responded to those objections and, at the request of the Board, further information was furnished to the Board by the parties.

2. The union requested in its statement of desire that an oral hearing be convened to inquire into the objections raised. The employer resists this request, and asks the Board to decide the objection on the basis of the written materials before it. In our view, it is unnecessary to convene an oral hearing to deal with the objections raised by the union. The Board has the jurisdiction, pursuant to section 104(13) of the *Labour Relations Act*, to determine its own practice and procedure, as long as the parties are given a full opportunity to present their evidence and to make their submissions. The Board is satisfied that such a full opportunity has been provided to the parties to this application. In our view, it would be an inappropriate use of Board resources to schedule this case for an oral hearing, in light of the objections raised by the union, which are outlined directly below.

3. By way of background, on February 1, 1994, the parties met with a Board Officer to make arrangements for the taking of the vote. As part of that process, the parties agreed to a voter's list composed of 31 individuals. The voter's list contained the following acknowledgment made by the parties:

"The Parties hereby agree that the foregoing list of 31 employees constitutes the list for purposes of the vote"

This list was signed by a representative of both the union and the employer.

4. On the date of the vote, two individuals were struck from the voter's list on the consent of the parties. They did not vote, but the remaining 29 employees on the voter's list each cast a ballot. As well, during the course of the representation vote, one Irma Sasse, described as "Food Service/Meat Packer", attended at the place designated for voting and asked to vote. Her name was not on the voter's list. Ms. Sasse was provided with a ballot and cast her vote. However, pending determination of her eligibility to vote, Ms. Sasse's ballot was segregated.

5. Subsequent to the casting of ballots, the scrutineers present on behalf of the parties each executed a "Certification of Conduct of Election" form in which they certified "that the balloting was fairly conducted and that all eligible voters were given an opportunity to cast their ballots in secret..." Furthermore, the representatives of the parties at the count executed a Consent and Waiver Form which reads, in part, as follows:

"WE the undersigned hereby consent to an immediate counting of the ballots cast at the representation vote directed by the Board and held on February 24, 1994.

We the undersigned hereby agree that the following persons:

Irma Sasse

are eligible for inclusion in the bargaining unit and that their ballots should be counted; ...

AND WE hereby waive objections as to the regularity and sufficiency of the balloting.

Once this Consent and Waiver Form was executed the ballot of Ms. Sasse was added to the 29 other ballots cast. The Board notes here that Mr. Fisher, the union's organizer and representative at the count, acknowledges in his written materials that prior to agreeing to the inclusion of the ballot of Ms. Sasse he spoke to the union's scrutineer, a bargaining unit employee, who told Mr. Fisher that Ms. Sasse had been an employee of the employer for 18 years.

6. When the ballots were counted there were 14 votes in favour of the applicant, 14 votes against the applicant, and two spoiled ballots.

7. The union now objects to the results of this representation vote, and asks the Board to order a further vote, on the following grounds:

- (a) that Irma Sasse ought not to have voted. The applicant advises that subsequent to the vote it was brought to its attention that Ms. Sasse is a member of management; and
- (b) that one Duranka Krbavac was not on the voter's list, but ought to have been, as she is an employee of the employer in the bargaining unit.

The Board will deal with each of these grounds below.

8. With respect to the eligibility of Ms. Sasse, we note that it is the employer's position that Ms. Sasse is not an individual who exercises managerial functions, and that she was properly entitled to vote. In our view, however, it is not necessary to make that determination for the purposes of our decision. In *C. E. Jamieson & Co, (Dominion) Limited* [1987] OLRB Rep. July 953, the employer attempted to change its earlier position regarding the eligibility of two voters in the face of a representation vote which had resulted in a tie with five segregated ballots at issue. The Board made the following observation at paragraph 6 of its decision:

6. As the Board stated in *Union of Canadian Transport Employees*, [1985] OLRB Rep. Oct. 1541:

"This Board has consistently held that parties should not be permitted to later resile from agreements made in earlier stages of certification proceedings: see, for example, *Diasons Press Limited*, [1964] OLRB Rep. Aug. 215; *Bertie District High School Board*, [1964] OLRB Rep. Aug. 231, *Warner Brothers Distributing (Canada) Limited*, [1974] OLRB Rep. Dec. 883; and, *J. J's Restaurants Limited*, [1977] OLRB Rep. July 465. ..."

For the same reasons that the Board will not allow parties to resile from their representations or agreements made in earlier stages of a certification proceeding, we take the view that the intervener employer cannot now resile from its agreement made at an earlier stage of this decertification proceeding. It would be both inequitable and an abuse of Board proceedings to allow the intervener employer to now assert the eligibility to vote of two employees whom it previously maintained before the Board were not properly within the bargaining unit. Indeed, the Board has acted upon that prior representation. As noted above, neither of these two employees has chosen to participate in this proceeding, and neither of them is asserting that he ought to have been eligible to vote. We are not prepared to conclude that the fact that they voted must mean that they felt they were properly in the bargaining unit. As we will not allow the employer to

now assert the eligibility of Juan and Manuel Cuevas to vote, and as neither of them asserts it, they remain ineligible and their ballots shall be destroyed and not counted.

9. We are of the view that the same general principle applies to this matter. The parties, at the completion of the voting, agreed to open the ballot box and count the ballots immediately. Before doing so the parties agreed, in writing, to include the ballot of Ms. Sasse, and confirmed that agreement by way of execution of the Consent and Waiver. Once the ballots are counted it is, in our view, both inequitable and an abuse of Board proceedings to permit the union to challenge the status of Ms. Sasse. Its opportunity to challenge her status was waived by the union and the applicant cannot now resile from its agreement.

10. With respect to the union's objection regarding Ms. Krbavac, in our view similar considerations apply. We are not convinced, on the materials placed before us, that Ms. Krbavac was eligible to cast a ballot at the representation vote. However, even if Ms. Krbavac were eligible to vote, we are of the view that, at this late date, it would be inequitable and an abuse of the Board's proceedings to order a new vote on the grounds urged by the applicant. Prior to the taking of the vote the parties agreed to the composition of the voter's list. Ms. Krbavac's name was not on that list, nor was there any suggestion that her name ought to have been on that list until after the vote had been completed and the results learned by the parties. The parties' scrutineers certified that all eligible voters had had an opportunity to vote and, in contrast to Ms. Sasse, Ms. Krbavac did not present herself at the poll to vote. In our view, it is now improper for the applicant to request a second representation vote, as the opportunity for asserting that Ms. Krbavac was an eligible voter has long since passed.

11. Accordingly, we decline to order a second representation vote as requested by the applicant.

12. On the taking of the representation vote directed by the Board not more than 50% of the ballots cast were cast in favour of the applicant.

13. The application is therefore dismissed.

14. The Board will not entertain an application for certification by the applicant with respect to any of the employees of the responding party in the bargaining unit within the period of six months from the date hereof.

15. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before the expiration of such 30 day period.

2191-90-G; 2192-90-R United Brotherhood of Carpenters and Joiners of America Local 1256, Applicant v. Maaten Construction Limited; 865541 Ontario Inc., Responding Parties

Construction Industry - Construction Industry Grievance - Related Employer - Carpenters' union alleging that hotel and construction manager for hotel construction project constituting one employer for purposes of the Act - Union also grieving alleged violation of construction management provision of Carpenters' provincial agreement - Board finding that construction management provision of collective agreement contravened when bids solicited from non-union contractors for foundation work, but in no other respect - Board applying *Dalton* case and declining to exercise discretion under section 1(4) of the Act where contravention of construction management clause arising out of circumstances where construction manager did not acquire any right or obligation over work covered by agreement

BEFORE: *Ken Petryshen*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *N. L. Jesin* and *R. Carlton* for the applicant; *Bruce Binning*, *Ken Maaten* and *Peter Maaten* for Maaten Construction Limited; *Brian T. Daly* and *Alex Jongsma* for 865541 Ontario Inc.

DECISION OF THE BOARD; April 26, 1994

1. These applications are amended to reflect the correct name of the responding parties as: "Maaten Construction Limited; 865541 Ontario Inc."
2. Of the two applications before the Board, one is an application by the United Brotherhood of Carpenters and Joiners of America, Local 1256 (Local 1256") in which it claims that Maaten Construction Limited ("Maaten") and 865541 Ontario Inc., which carries on business under the name Days Inn Sarnia ("Days Inn"), constitute one employer for purposes of the *Labour Relations Act*. The other is a section 126 application in which Local 1256 alleges that Maaten and Days Inn contravened the Carpenters' Provincial Agreement (the "Agreement").
3. The dispute between the parties arises out of the construction of a hotel in Sarnia (the "Project") by Mr. A. Jongsma in 1990 called the Days Inn. Days Inn engaged Maaten as a construction manager for the Project. Local 1256 and Maaten are bound to the Agreement. Local 1256 argues that the relationship between Maaten and the Days Inn on this Project entitles it to the section 1(4) relief it requests. Local 1256 also contends that Maaten has contravened Article 4 of the Agreement, the subcontracting provision. In particular, it is alleged that Maaten has contravened the construction management provision of that clause. The parties advised the panel that this was the first occasion the Board has been called upon to interpret the construction management provision of a provincial agreement.
4. In their submissions, the parties made extensive reference to the decision of the Board in *Dalton Engineering & Construction Limited*, [1988] OLRB Rep. June 567 (the "*Dalton* decision") and the provisions of the 1988-1990 and 1990-1992 provincial agreements. Since the *Dalton* decision and the provisions of these agreements provide the context for this dispute, we find it useful to refer to them at the outset.
5. In the *Dalton* case, the Board was confronted as well with a section 1(4) application and a construction industry grievance. Labourers Local 506 ("Local 506") brought the applications against Dalton Engineering & Construction Limited, ("Dalton") and Rumble Pontiac Buick,

(1985) Inc. ("Rumble"). Dalton is a general contractor and Rumble operates a General Motors dealership. Dalton entered into a construction management relationship with Rumble in connection with the building of a new automobile showroom and for the renovation of some existing facilities. Dalton and Local 506 were bound to the Labourers' Provincial Agreement. This agreement limited Dalton to engaging subcontractors who are in contractual relations with the Labourers' for the performance of work coming under the scope of the collective agreement. Certain demolition work that was covered by the collective agreement was also covered by Dalton's commercial contract with Rumble. This work was performed by A.B.C. Demolition ("A.B.C.") who was not in contractual relations with the Labourers. The contract for the performance of the demolition work was between Rumble and A.B.C.

6. Acting as construction manager, Dalton became an integral part of the project management team. Dalton's services included the preparation of a list of contractors in each trade for bid tendering purposes, the preparation of bid specifications and arranging for tenders to be submitted to Rumble, the evaluation of tenders and recommending the awarding of contracts to Rumble. Dalton assumed total responsibility for all work covered by its contract with Rumble and warranted for one year the work of trade contractors. The commercial agreement provided that Rumble would let the contracts to the trade contractors, not Dalton.

7. In the *Dalton* decision, the Board summarized the position of Local 506 as follows:

4. The applicant contends that the performance of the work by ABC was a violation of the Agreement by Dalton because Rumble and Dalton were under common direction or control within the meaning of subsection 1(4) of the Act and should be treated as constituting one employer, making Rumble bound to the Agreement, or, in the alternative, in substance, it was Dalton which contracted with ABC notwithstanding that the form of the contract was between Rumble and ABC. Local 506 counsel claims that the arrangement under which Rumble entered into a contract with ABC to perform the work was a sham designed to allow Dalton's subcontracting obligations to be circumvented. Whether or not that was the intention of the arrangement, the result was still a violation of their Agreement according to applicant counsel. ...

8. The Board ultimately dismissed the grievance and the section 1(4) application. In disposing of the grievance, the Board made the following comments:

38. The language of the Agreement referred to above at paragraph 35 clearly gives any employer who, like Dalton, is bound by it, a choice of performing work with his own employees or engaging "...sub-contractors who are in contractual relations with [Local 506]...". It is implicit in that language that, in order to be in a position to make that choice, the employer must have control over the work. If the employer is not the owner of the project, this means that the employer must have acquired some right or obligation to perform the work. The facts of this case are clear: Rumble owned the Project and, at the point when it contracted with Dalton for the construction services described at paragraph 14 of this decision, it was Rumble and not Dalton which was in the position of deciding whether to construct the Project by hiring its own tradesmen or by contracting to have it constructed by the tradesmen of another employer or other employers. When Rumble decided to enter into the arrangement with Dalton, it expressly reserved to itself the choice of the contractors who would construct the Project and the right to bind them directly to Rumble for the performance of the work. Wood's conduct with respect to awarding and executing the trade contracts for Rumble was wholly consistent with that express reservation. Under the terms of the trade contracts, the trade contractors warranted their work to Rumble for two years. It was only after each trade contract was executed by Rumble that Dalton became responsible for supervising the performance of the trade contract and for warranting to Rumble for one year the quality of the finished work. The fact that Dalton made itself independently liable for the work of the trade contractors who had been selected by Rumble and bound by contracts with it to perform the work of constructing the project does not alter the fact that Rumble, having exercised the initial choice to have the work done by the employees of other employers, expressly withheld from Dalton the right, obligation or opportunity to make that choice or to choose the employers who employees would construct the Project. On the facts

of this case, Dalton did not acquire the right or obligation to make those choices. Consequently, at the time each trade contractor was engaged, Dalton did not have control over the work being awarded essential for it to have engaged the contractor either directly or indirectly. Nor, on the facts of this case, can it be said that Rumble did nothing more than sign the trade contracts, that its awarding and executing of contracts was a mere matter of form and a subterfuge. Rumble, through Wood, engaged three contractors, Keith Plumbing, Electriclee Ltd., and Tomas Masonry, because Wood knew them. Even with ABC, without waiting for any recommendation from Dalton, Wood simply instructed it to prepare a contract for Rumble to execute with ABC, the obvious low bidder.

39. The substance of the contractual arrangement between Dalton and Rumble, on the facts of this case, was that Rumble and not Dalton engaged the trade contractors regardless whether the form of the arrangement was that of a construction management contract, a cost plus general contract or a general contract. Therefore, in all of the foregoing circumstances, the Board finds that it was Rumble Pontiac Buick (1985) Inc., and not Dalton Engineering & Construction Limited which engaged A.B.C. Construction Limited to perform the demolition work. In the result, Dalton Engineering & Construction Limited has not violated clause 2.05 of the Labourers Provincial Agreement which was in effect from June 25, 1986 to April 30, 1988.

9. The Board's reasons for dismissing the section 1(4) application are set out in the following paragraphs:

40. ... Even were the Board to find that the preconditions exist for the Board to have the discretion to make the declaration requested, in the circumstances of this case, the Board would not make the declaration. Rumble was not under any statutory or contractual prohibition from seeking to have the Project constructed with non-union labour. Dalton's contractual obligation under the Agreement was to engage only subcontractors who are in contractual relations with Local 506 for work covered by the Agreement. That obligation is not a prohibition against Dalton selling its construction expertise to purchasers of construction in such a manner as to not require or cause it to engage subcontractors. If, when the parties to the Agreement negotiated clause 2.05, their objective was to prohibit employers from entering into contracts like the one between Dalton and Rumble, it was open to them to negotiate language which would achieve that purpose. Building trades unions have demonstrated an ability to negotiate a wide variety of conditions aimed at preserving employment opportunities for their members and protecting the bargaining rights of the unions. For example, clauses have existed in construction industry collective agreements in Canada for many years which allow employees to refuse to work with materials which have not been fabricated by members of the union party to the collective agreement. Similarly, there are agreements in the construction industry which permit members of a trade union employed by an employer under collective agreement with the union to refuse to work for the employer on a project where "non-union" trades are employed. In the Board's view, the bargaining table is the appropriate forum for a union to seek those kinds of protections for its bargaining rights.

41. Were the Board to declare that Dalton and Rumble be treated as constituting one employer for purposes of the Act, the effect would be to bind Rumble to the Agreement and make it in breach of clause 2.05 for having engaged ABC to do the demolition work. That would have the effect of giving the parties to the Agreement a result which they failed to negotiate and would be analogous to the Board using its discretionary powers under subsection 1(4) to extend bargaining rights rather than to preserve them. The purpose of subsection 1(4) is to preserve rather than extend bargaining rights. Accordingly, the Board has consistently declined to exercise its discretion and declare that two or more entities be treated as one employer for purposes of the Act where the effect of the declaration would be to extend bargaining rights.

42. The Board long has recognized that bargaining rights and the employer obligations flowing from them attach to a business or activity which gives rise to employment. In the present case, the Agreement defines Local 506's bargaining rights and Dalton's obligations in respect of those rights. The business or activity carried on by Dalton to which those rights and obligations attach is its performance of work covered by the Agreement. As the dissent correctly points out at paragraphs 29 and 30, an employer like Dalton who is bound to the Agreement and acquires work covered by it, is obliged to have the work performed by members of Local 506. However,

it is implicit in all of the clauses creating Dalton's obligation under the Agreement that, in order to be bound to the terms of the Agreement, Dalton first must have acquired in the commercial sense the right or obligation to determine whether to hire and assign the work or to engage another contractor to do the work with that contractor's employees. As the dissent recognizes at paragraph 31, Dalton did not acquire the right or obligation to perform the demolition work at issue. In the view of the majority, that fact is as pivotal a consideration to the exercise of the Board's discretion under subsection 1(4) as it was to finding that Dalton had not violated clause 2.05. This is because subsection 1(4) can be triggered to protect bargaining rights when a business or activity to which they attach is transferred to a related business or activity without any of the usual indicators of a transfer of a business which would attract section 63 of the Act. See *Brant Erecting, supra*, at paragraph 14. Were one to agree with the dissent that Dalton and Rumble carried on associated or related activities under common control or direction, and had Dalton transferred to Rumble a business or activity in the form of work covered by the Agreement which it had the right or obligation to perform, a one employer declaration well may have been an appropriate remedy. On the facts before the Board in this case, however, Dalton did not have any business or activity to transfer to Rumble.

43. While the Board has concluded that it should not issue a single employer declaration on the facts presented by this particular case, such a conclusion does not preclude the Board, in the appropriate circumstances, from finding that contracts between purchasers of construction and contractors in the nature of the Contract form an appropriate basis for making a single employer declaration under subsection 1(4). Different facts might well lead the Board to the conclusion that a contractor had acquired work protected by a subcontracting clause, had circumvented its subcontracting obligation by entering into a scheme to have the purchaser award the work and that a one employer declaration should issue as relief to the offended trade union.

10. One of the issues during bargaining for the 1988-90 provincial agreement was the construction management issue. Although the parties to those negotiations did not have the *Dalton* decision, they were well aware of the circumstances which gave rise to the dispute. In order to address the problem, the parties agreed to alter the subcontracting provision of the Agreement to read as follows:

ARTICLE 4 - SUBCONTRACTING

4.01 Any work that is the work of the union under the provisions of Article 19 of this Agreement shall only be contracted or subcontracted to an employer bound by this Agreement.

4.02 Violation of this Article shall be subject to grievance and arbitration notwithstanding any reference of any jurisdictional dispute to any tribunal over the same work.

4.03 Construction Management - Without restricting in any way the application of the subcontracting provision contained in Article 4.01 of this Agreement, an Employer who undertakes a contract with an owner to provide construction management services shall be subject to said Article 4.01 unless:

- (i) The owner solicits directly bid(s) for work covered by this Agreement from contractor(s) not bound by this Agreement; and
- (ii) The owner accepts bid(s) from such contractor(s); and
- (iii) The owner contracts or subcontracts directly with such contractor(s) without contractual obligation of the Employer for the work of such contractor(s) other than for the negligent acts or omissions of the Employer.

11. In the next round of bargaining, Article 4 was altered again. The subcontracting provision within the 1990 - 1992 agreement reads as follows:

ARTICLE 4 -SUBCONTRACTING

4.01 Any work that is the work of the Union under the provisions of Article 19 of this Agreement shall only be contracted or subcontracted to an employer bound by this Agreement.

4.02 Violation of this Article shall be subject to grievance and arbitration notwithstanding any reference of any jurisdictional dispute to any tribunal over the same work.

4.03 Construction Management - Without restricting in any way the application of the subcontracting provision contained in Article 4.01 of this Agreement, an Employer who undertakes a contract with an owner to provide construction management services shall be subject to said Article 4.01 unless:

- (i) The owner selects contractor(s) not bound to this Agreement to bid on work covered by this Agreement and solely and directly solicits or obtains bid(s) for such work from such contractor(s) without any involvement or participation by the Employer in the selection of such contractor(s) (except as to the validity of the bid(s)) or the solicitation or obtaining of any bid(s) from any contractor(s) regardless of whether it (they) is (are) bound or otherwise to this Agreement.
- (ii) The owner accepts bid(s) from contractor(s) not bound to this Agreement; and
- (iii) The owner contracts or subcontracts directly with contractor(s) not bound to this Agreement without contractual obligation of the Employer for the work of such contractor(s), other than for the negligent acts or omissions of the Employer.

4.04 Any failure to comply with Article 4.03 of this Agreement shall render the employer liable for damages equivalent to those for the breach of the subcontracting provision set forth in Article 4.01 above.

4.05 The employer shall advise the owner of the provisions of Articles 4.03 and 4.04 when undertaking the construction management service contract.

12. With the above provisions, the parties have addressed the reality of construction management in a way that benefits general contractors and the trade unions in the ICI sector. The subcontracting provision will not apply as long as construction managers limit their role in the contracting out of work covered by the Agreement. A failure to comply with the restrictions contained in subsection 4.03 will make the construction manager subject to section 4.01 of the Agreement.

13. Counsel for Maaten called Peter and Ken Maaten to testify. Each is a Vice-President of Maaten and both were involved with the Project. Counsel for Days Inn called A. Jongsma to give evidence. Counsel for Local 1256 called J. Lapp, an estimator for one of the contractors involved in the Project, and R. Watt, the site superintendent employed by Maaten on this Project, to give evidence. In making its factual determinations the Board has carefully reviewed the oral and documentary evidence and the parties submissions relating thereto.

14. In deciding to build the Days Inn, A. Jongsma wanted to retain as much control as possible. He, along with family members, own other properties which required some construction work. He owns and operates the 401 Motor Inn which is close to the Days Inn. After buying the 401 Motor Inn, he gutted and renovated the building. He and his family took on these previous construction tasks without anyone's assistance. Given the size of the Days Inn Project, Jongsma determined it would be wise to obtain some outside help. The architect and engineering firm he retained advised him about the different methods of construction available. He selected the construction management route since it gave him the control and flexibility he wanted.

15. K. Maaten negotiated the commercial agreement with Jongsma. When he heard about the project, K. Maaten talked to Jongsma about preparing a quote. Jongsma advised K. Maaten that he would consider non-union trades on the Project and wondered if that would be a problem. Jongsma was reluctant to get involved with union contracts only to the extent that he wanted the best contractor at the best price. He was quite prepared to receive bids from both union and non-union contractors. K. Maaten referred to the collective agreements Maaten was bound to and made reference to the construction management provision. An initial construction management proposal based on a management fee of five percent of the actual cost of the Project was rejected by Jongsma since he wanted a fixed fee. They eventually agreed on a management fee of \$110,000.00. Since this was the first occasion Maaten was to provide construction management services, K. Maaten sought advice from the Ontario General Contractors Association (O.G.C.A.). He was advised that a standard form contract referred to as CCA5 was the best one to sign. With some modifications, the parties executed the CCA5 contract prepared by K. Maaten. K. Maaten candidly testified that in preparing the commercial contract for execution with Days Inn, he did not consider the implications of subsection 4.03 of the Agreement.

16. We find it unnecessary to review the terms of the commercial contract in detail. Many of the terms found therein are common to the typical construction management arrangement. The general conditions of the commercial contract set out the construction managers' responsibilities during the pre-construction, the construction and post-construction phases of the Project. During the pre-construction phase, Maaten is obliged to assemble all bid documents for the solicitation of competitive bids, to analyse the bids received and recommend awards to Days Inn. The contracts entered into were to be between the trade contractor and Days Inn. The commercial contract did not require Maaten to warrant the work of the trade contractors. In many key respects the commercial contract entered into here was not unlike the one between Dalton and Rumble. Most significantly, the owner of the Project in both cases was a party to the contracts with the trade contractors, not the construction manager. As in the *Dalton* case, the commercial contract requires the construction manager to play a role in the solicitation of bids and recommending awards. This did not cause any difficulties for the construction manager in the *Dalton* case given the provision of the subcontracting provision as it then was. However, Maaten would clearly run afoul of the conditions in subsection 4.03 of the Agreement if it participated in the bidding process as contemplated by the commercial contract it had with Days Inn.

17. In approximately April 1990, Maaten prepared and put out tenders for the foundation work as agent for Days Inn to both union and non-union contractors. This approach was consistent with the advice he had received previously. K. Maaten was again quite forthcoming in admitting that his intention was to follow the same practice with all contracts for the Project. Shortly after sending out the tenders for the foundation work, K. Maaten received a telephone call from Ron Carlton, Business Manager for Local 1256. Carlton expressed his displeasure at the construction management arrangement and told K. Maaten that he would watch and get them. As a result of Carlton's call, K. Maaten obtained further advice from a representative of the Sarnia Construction Association as well as Brute Binning. After obtaining advice from Mr. Binning, Mr. Maaten determined that he should no longer act as an agent for Days Inn. K. Maaten testified, and we accept as evidence in this regard, that Maaten did not intend to enter into a construction management arrangement with the Days Inn that would cause it to contravene its collective agreements and that Jongsma was aware of this. Having obtained legal advice from Binning, Maaten intended to conduct its construction management functions so as not to contravene the subcontracting provisions of the Agreement. Partly because of the advice he received, the decision was made that Maaten's own forces would perform the foundation work using members of the Carpenters' and Labourers'. This decision was also made because of a change in design from concrete to block construction.

18. The legal advice from Binning obviously necessitated further communication between Maaten and Days Inn. K. Maaten met with Jongsma in mid-May, explained his understanding of Maaten's collective agreement obligations and, in effect, indicated that Maaten would no longer be involved in soliciting and awarding contracts as long as Days Inn intended to pursue non-union contractors. In early July, 1990, K. Maaten sent to Jongsma the provisions of the new subsection 4.03 along with a written explanation of how the clause worked prepared by the Labour Relations Bureau of the O.G.C.A.. Jongsma was not happy with the situation concerning the foundation work and was quite content to assume complete control over the bidding process, a degree of control he thought he had in any event given his view of the commercial contract.

19. Subsequent to the tendering for the foundation work, all other carpentry contracts were handled by a procedure that would avoid Maaten contravening the Agreement. The Board heard evidence about how a lot of work was performed and how it came to be performed. We do not propose to detail that evidence here other than to highlight the following. Any contracts that were let to trade contractors were between Days Inn and the particular contractor. Jongsma determined who would bid for certain work, evaluated the bids and selected the successful bidder. In a limited number of instances, Jongsma requested the assistance of Maaten in order to assess the validity of the bids. Jongsma seldom reviewed bids with Maaten. Maaten prepared the scope of work and tender documents and eventually prepared the contract documents on instructions from Days Inn. Maaten did not warrant the work of the contractors. Each contractor warranted the work directly to the owner and each contractor was paid directly by the owner. Jongsma was on the site every day for approximately ten to twelve hours. He dressed in construction clothing and with his own forces performed a considerable amount of the construction work. For instance, his own forces under his direction installed windows, vanities, shutters, HVAC units, insulation, tubs and sinks. His forces kept the site clear and did material handling as well. R. Watt, Maaten's site superintendent, was engaged in scheduling and co-ordinating the work of the various trade contractors. Watt had no responsibility for Jongsma's forces except to the extent that he would treat them as he would the employees of any other contractor.

20. Days Inn entered into a contract with Edwards Door Systems Limited ("Edwards") for the supply and installation of double egress doors referred to by Edwards as the "Total Door" system, which is a particular type of fire door system. Edwards is a non-union contractor who has dealt with Maaten in the past. Local 1256 takes the position that Maaten's role with respect to the Edwards contract should lead us to conclude that Maaten contravened Article 4 of the Agreement.

21. J. Lapp testified about how he came to quote a price on the "Total Door" system. He indicated that he had attended at Maaten's premises to meet with Maaten's estimator in relation to another project. While there, he somehow saw the plans for the Project. The evidence does not suggest that anyone in Maaten directed Lapp's attention to the plans. Lapp requested permission to review the plans in order to prepare a quote. He reviewed the plans which at that time provided for regular fire doors, and submitted a quote to Maaten for the "Total Door" system. It is not clear from the evidence whether Lapp requested permission of Peter Maaten to review the plans or whether he only spoke with Maaten's estimator. Maaten, apparently at the request of Jongsma, reviewed the possibilities of the "Total Door" system. It appears that Jongsma decided to accept the concept of this system based on its aesthetics. Jongsma worked out a price with W. Cassidy, a vice-president at Edwards. Edwards is an exclusive supplier of the "Total Door" system so that Jongsma was unable to obtain any other bids. In order to obtain a warranty for this product, Edwards requires that it also perform the installation. It appears as well that the labour cost associated with the installation of the "Total Door" system is minimal since the doors are simply installed on the frames.

22. Maaten investigated the feasibility of the “Total Door” system and also was involved in negotiating a credit. These represented legitimate functions of a construction manager. We do not accept the submission made by counsel for Local 1206 that the mere recommendation of a system that has an exclusive supplier necessarily involves one in the solicitation of the successful bidder. It is somewhat difficult to make an assessment having regard to the evidence before us as to whether Maaten was involved in soliciting or obtaining Edward’s bid on the “Total Door” system. Counsel for Maaten argues that all that took place was that Edwards made a proposal to alter the plans which had nothing to do with bidding. We do not believe it is that simple. When we look at the evidence before us, it appears that Lapp saw the plans for the Days Inn Project and with the hope of obtaining some work decided that he would bid on the job. Maaten did not initiate the effort and it is difficult to tell precisely what Maaten’s role was given Lapp’s failure, which is not surprising, to recall some of the details of his interaction with Maaten. Peter Maaten testified that he had no involvement in soliciting or obtaining the Edward’s bid and Jongsma testified that it was he and Edwards that negotiated the contract. On the evidence before us we are not satisfied that Maaten’s conduct was such as to lead us to conclude that it solicited or obtained the Edward’s bid.

23. In reviewing the evidence relevant to the subcontracting grievance, the Board finds that except for the foundation work, the circumstances in subsection 4.03 are not present which would make subsection 4.01 applicable. In our view, Maaten did contravene subsection 4 of the 1988-90 Agreement when it solicited bids from non-union contractors for the foundation work and we so declare. Since this work was ultimately performed by Maaten’s own forces using members of the Carpenters’ and Labourers’ working under the relevant provincial agreements, no damages arise for this contravention of the Agreement. We agree with the submission of counsel for Maaten that each aspect of the work that is subcontracted must be examined on an individual basis. The intent of the parties as reflected by the subcontracting provision is to deal with each part of the work subcontracted separately. In other words, if the construction manager were to solicit bids for drywall work, subsection 4.01 becomes operative and damages potentially owing only for the drywall subcontracting and not for all subcontracting on the project. In this case, the violation of the Agreement relating to foundation work means that Maaten could have been liable potentially for only the foundation subcontracting on the Project.

24. We turn now to Local 1256’s request for section 1(4) relief. Counsel for Maaten argues that the material circumstances here are no different from those in the *Dalton* case and therefore should lead the Board to dismiss the section 1(4) application. As well, counsel submits that since the request for section 1(4) relief is based only on the construction management arrangement, the Board should not exercise its discretion in favour of granting any relief. By specifically addressing the construction management arrangement in bargaining, counsel contends it should not be open for Local 1256 to pursue this relief. Counsel for Local 1256 argues that the facts here are different from those in the *Dalton* case and accordingly warrant a different result. In particular, counsel contends that the new subcontracting provision in light of the facts should lead the Board to exercise its discretion in its favour. Counsel refers to the last sentence in paragraph 43 of the *Dalton* decision in support of his view that the facts here would have caused the majority in the *Dalton* case to reach a different result. Again that sentence reads as follows:

43. ... Different facts might well lead the Board to the conclusion that a contractor had acquired work protected by a subcontracting clause, had circumvented its subcontracting obligation by entering into a scheme to have the purchaser award the work and that a one employer declaration should issue as relief to the offended trade union.

25. In our view, the circumstances in the *Dalton* case which led the Board to refuse section 1(4) relief are present in this case as well. In particular, as the Board noted in the *Dalton* decision, the fact that Dalton did not acquire the right or obligation to perform the work at issue was a “piv-

otal consideration to the exercise of the Board's jurisdiction under section 1(4)". In this case, Maaten also did not acquire the right or obligation to perform the work that was contracted out, either by the terms of the commercial contract by some other arrangement between the parties. Days Inn and only Days Inn had control over the work covered by the Agreement. In referring to the last sentence in paragraph 43, counsel argues that it is not only rights or obligations over the work that are significant. He submits that rights or obligations in relation to the work are sufficient such that when Maaten had some rights regarding bidding by the commercial contract and then gave them away in practice, one should conclude that Maaten provided a basis for the Board to grant the section 1(4) relief. We disagree. The Board's comment in paragraph 43 in the *Dalton* decision focuses only on the construction manager acquiring the right or obligation to perform work protected by the subcontracting clause. Although the relatively new Article 4 considerably restricts the role of a construction manager in the process of contracting out work, this does not lead us to conclude that our focus should be broader than the approach taken in the *Dalton* case.

26. As noted earlier, the parties since *Dalton* have specifically negotiated a provision dealing with the construction management arrangement. Rather than prohibiting such arrangements, the provision provides some legitimacy to a construction management arrangement while at the same time containing certain requirements to protect the trade union's interests. However, the mere negotiation of the construction management provision does not preclude a trade union from attempting to obtain section 1(4) relief. The facts of each case will determine whether the preconditions of section 1(4) have been met and whether it would be appropriate to exercise the discretion to grant a single employer declaration. It is unlikely that the Board would ever exercise its discretion under section 1(4) in circumstances where the construction management provision was not contravened. If such a provision were contravened, the issue of whether section 1(4) relief would be appropriate may depend on the nature of the contravention. A contravention of the subcontracting provision arising out of circumstances where the construction manager did not acquire any right or obligation over the work covered by the Agreement, as in this case, would not likely result in a declaration being granted. On the other hand, a contravention of the construction management clause in circumstances where the construction manager acquires rights or obligations to the work covered by the Agreement may lead the Board to grant section 1(4) relief.

27. Without deciding whether the preconditions exist for the Board to exercise its discretion, and for the reasons given above, the Board finds it would be inappropriate in this case to grant a section 1(4) declaration.

28. In summary, except for the declaration relating to the foundation work, the Board finds that Maaten did not contravene the Carpenters' Provincial Agreement. Since the Board declines to exercise its discretion under section 1(4) of the Act, the application under section 1(4) is dismissed.

3721-93-R Mechanics in Garage Maple Lodge Farm, Applicant v. United Food and Commercial Workers International Union, Local 175, Responding Party v. Maple Lodge Farms, Intervenor

Petition - Reconsideration - Termination - Board not accepting that petitions filed representing voluntary expression of wishes of employees - Termination application dismissed - Reconsideration application dismissed

BEFORE: *M. Kaye Joachim*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

APPEARANCES: *Daniel Rioux* for the applicant; *Kelvin Kucey* for the responding party; *Marilyn Silverman* for the intervenor.

DECISION OF THE BOARD; April 19, 1994

1. This is an application under section 58(1) of the *Labour Relations Act* for a declaration that the responding party (the "union") no longer represents the employees of the intervenor (the "employer") in the bargaining unit described below, for which it is the bargaining agent.
2. The union is currently the bargaining agent for the following bargaining unit:

all employees of Maple Lodge Farms Ltd. employed in its garage at R.R. #2, Norval, save and except General Garage Foreman, persons above the rank of General Garage Foreman, Driver Trainer and Office and Clerical staff.

Preliminary Motions

3. At the commencement of the hearing the union brought a motion to have the application dismissed as untimely. They also argued that the application was so lacking in particulars as to warrant dismissal. The union led no evidence with respect to the preliminary motions, relying solely on the application and the petitions filed.
4. The relevant provisions of the Act are set out below:

58.- (1) If a trade union does not make a collective agreement with the employer *within one year after its certification*, any of the employees in the bargaining unit determined in the certificate may, subject to section 62, apply to the Board for a declaration that the trade union no longer represents the employees in the bargaining unit.

62.-(1) Subject to subsection (3), where a trade union has not made a collective agreement within one year after its certification *and the Minister has appointed a conciliation officer or a mediator under this Act*, *no application* for certification of a bargaining agent of, or *for a declaration that a trade union no longer represents, the employees in the bargaining unit* determined in the certificate *shall be made until*,
 - (a) *thirty days have elapsed after the Minister has released to the parties the report of a conciliation board or mediator;*
 - (b) *thirty days have elapsed after the Minister has released to the parties a notice that he or she does not consider it advisable to appoint a conciliation board; or*
 - (c) *six months have elapsed after the Minister has released to the parties a notice of a report of the conciliation officer that the differences between the parties concerning the terms of a collective agreement have been settled, as the case may be. (emphasis added)*

5. The application was filed on January 31, 1994, along with an undated petition bearing seventeen signatures ("petition # 1"). The preamble to the petition stated "We do not wish to be represented by a union". The petition did not name the union or its locals. The union concedes that the application was timely, but argued that the petition was insufficient and should be disregarded.

6. In accordance with the Board's usual practice, a notice was posted in the workplace advising employees of the application for termination of bargaining rights. The notice advised the parties that any evidence that employees do or do not wish to be represented by the trade union must be filed by the terminal date, February 23, 1984. Two further petitions were submitted, one by another employee in the bargaining unit on February 22 ("petition #2") and one by the applicant on February 23 ("petition #3"). Those petitions contained many of the same signatures as contained on petition #1, and a few additional signatures. However, the preambles to petitions #2 and #3 referred specifically to the union and its locals.

7. The union argued that these latter two petitions should be treated as new applications that were untimely. The union was certified on December 23, 1992. On February 7, 1994, the union applied for the appointment of a conciliation officer. The union stated that Board Officer J. Miller was appointed on February 14, 1994, but no evidence on this point was presented to the Board. As of February 23, the union and the employer had not yet met with the conciliation officer, and thus no report had issued. The union asserted that petitions #2 and #3 should be treated as new applications that were untimely, as they were received by the Board *after* the appointment of the conciliation officer (February 14, 1994) but *before* thirty days had elapsed following the report of the officer (see section 62(1)(a) above).

8. The panel declined to dismiss the application at the outset but advised the applicant that they could renew their argument at the conclusion of the hearing. The union was advised that the Board would require evidence with respect to the date of the appointment of the conciliation officer, if the union intended to pursue this argument. In light of the ultimate disposition of the application, it is unnecessary to consider this argument.

The Merits

9. With respect to the merits of the application, section 58(3) states:

58.-(3) Upon an application under subsection (1) or (2), the Board shall ascertain the number of employees in the bargaining unit at the time the application was made and whether not less than 45 per cent of the employees in the bargaining unit *have voluntarily signified in writing* at the time that is determined under clause 105(2)(j.1) *that they no longer wish to be represented by the trade union*, and, if not less than 45 per cent have so signified, the Board shall, by a representation vote, satisfy itself that a majority of the employees desire that the right of the trade union to bargain on their behalf be terminated. (emphasis added)

10. Three petitions were filed prior to the terminal date, (one with the application, two subsequently) each of which contained a sufficient number of employee signatures to cause the Board to conduct its normal inquiry into the origination and circulation of each petition in order to determine whether it represented the voluntary expression of the individuals who signed it.

11. The Board proceeded to hear the applicant's evidence with respect to the circulation of the three petitions. Daniel Rioux testified with respect to the circulation of petitions #1 and #3. Petition #2 was drafted by an employee named Syed Hussain, but circulated primarily by a lead

hand named Robert Yake. The parties agreed that Mr. Hussain need not be called and that they would accept as a fact that Mr. Hussain had drafted petition #2. Mr. Yake testified with respect to the circulation of petition #2. At the conclusion of the applicant's case on March 14, 1994, the Board, on its own motion, decided that it would not require the responding party to call any evidence, and dismissed the application. The parties were advised orally of the Board's decision and were also advised that written reasons would follow. These are the Board's reasons for dismissing the application.

Background

12. The union was certified on December 23, 1992. During the organizing drive Daniel Rioux and Robert Yake circulated a petition and obtained the signatures of a number of employees who were opposed to becoming represented by the union. A different panel of this Board held a hearing to determine whether the petition was voluntary. By decision dated February 8, 1993, the Board decided that the involvement of the lead hand, Robert Yake, was fatal to the voluntariness of the petition:

8. The parties have agreed that the lead hands, including Mr. Yake, are bargaining unit employees, but whether or not they exercise "managerial functions" within the meaning of section 1(3)(b) of the *Labour Relations Act*, it is clear that the lead hands at this workplace have a relationship with management that is not that of a typical bargaining unit employee. The lead hands here would be perceived as linked with management. The lead hand on the night shift is the individual in charge of the shift. No "managerial" individual is present. As such, that lead hand will necessarily have to direct the work force during that shift. During the day shift, Mr. Yake appears to exercise a number of managerial functions, and is clearly perceived as linked to management, both because he was formerly the General Foreman of the plant, and because of the nature of his current duties and responsibilities. As noted, those responsibilities include imposing discipline, sending people home, and assigning work to employees on the afternoon shift.

9. There were no allegations of impropriety against the company, and there is no evidence that the company was in any way involved in the petitions.

3 10. In all the circumstances, we are satisfied that both the petitions originating from the night shift and the day shift were motivated in large part by the lead hands' collective decision to oppose the union, and the actions they then took in response. The lead hands were instrumental in obtaining or assisting in obtaining most of the signatures on the petitions. They were highly visible in terms of their participation in the origination of the petitions and in the collection of signatures on them. When all the circumstances are taken into account, we are satisfied that employees generally would have perceived the lead hands as somehow linked with management, and this in turn would have pressured employees to sign the petitions. In light of this, and notwithstanding the very credible evidence given by both Mr. Rioux and Mr. Yake, we are not satisfied that the petitions were voluntary.

The Law

13. There is an onus on the applicant to satisfy the Board, on a balance of probabilities, that the petition filed represents the voluntary wishes of its signatories. In order to satisfy the onus, the Board requires credible evidence regarding the origination, preparation and circulation of the petition. (*Hully Gully London Ltd.*, [1990] OLRB Rep. Feb. 160)). Although the Board has not laid down an exhaustive list of rules to apply in determining voluntariness, the Board has considered many factors; the following are relevant to this case:

(a) The applicant is expected to call witnesses to give evidence, based on *personal* knowledge and observation, relating to the circumstances of the origination and preparation of the petition, and the manner in which *each* signature was obtained. Each and every signature on the petition must be

identified and the circumstances under which it was obtained must be described. Where such evidence is not presented, the signature may, and likely will, be discounted. (*Custom Foam Specialities Limited*, [1986] OLRB Rep. Dec. 1680) (emphasis added)

(b) The Board has declined to accept petitions as voluntary expressions of employee wishes where there are gaps in the evidence regarding ongoing custody of the petitions (*Hully Gully London Ltd.*, *supra*)

(c) Where management employees or employees who are associated with management are involved in the circulation of the petition, the Board has declined to accept the petition as voluntary.

...In addition, the circulation of petitions must be free from the actual or perceived influence of management. Consequently, the Board will discount the signature of any employee who is, or is perceived to be, managerial. Similarly, where managerial personnel, or persons who are perceived as having a greater proximity to management than other employees, are involved in originating or circulating a petition, it is difficult to escape the conclusion that the employees would reasonably have perceived the petition to be supported by the employer and its reliability as a gauge of employee desires will be destroyed (*Custom Foam*, *supra*, at paragraph 11)

(d) Although there is no rule against circulating a petition in the workplace, the Board may question the voluntariness of a petition circulated at the workplace. The Board has reasoned that employees would likely perceive that a petition circulated in the workplace is supported or condoned by management. (*Ontario Hospital Association Blue Cross*, [1980] OLRB Rep. Dec. 1759)

The Evidence

14. The employees in the bargaining unit, the garage employees at Maple Lodge Farms, work on two shifts, a night shift and a day shift. There are three day crews and three night crews. There is a lead hand on each crew. When two crews work together, one of the lead hands “steps down” leaving one lead hand in charge of the double crew. When leading a single crew, the lead hand generally performs the same work as the other employees. In addition, the lead hand is responsible for answering the telephone, organizing work assignments and generally, liaising with management. Lead hands on double crews do very little hands on garage work and more “managing”. Their responsibilities include assigning work to employees, imposing minor discipline, sending people home, monitoring the length of the coffee breaks, and assessing the work of new employees.

15. Generally, the situation is much the same as it was approximately one year ago, when a different panel of the Board concluded that lead hands in this particular work environment would be perceived as linked with management. We reach the same conclusion.

Petition #1

16. Mr. Rioux drafted and circulated petition #1. He is not a lead hand. Although he discussed the idea of circulating the petition with other employees, including some lead hands, he testified that the decision to circulate the petition was his alone. He obtained seventeen signatures on this petition, over two to three days. For the following reasons, the Board does not accept that petition #1 is a voluntary expression of the wishes of the employees.

17. First, during examination by the Board and cross-examination by the responding party, Mr. Rioux contradicted himself several times about the dates, times and circumstances surrounding the signing of petition #1. He frankly admitted to being confused because of the circulation of the subsequent petitions. In the end, Mr. Rioux could only state that he had witnessed each employee sign petition #1, but he could give no reliable evidence with respect to any of the circumstances surrounding each signature. This lack of reliable evidence with respect to the signatures on the petition is fatal.

18. Second, Mr. Rioux indicated that four out of the first seven signatures on the petition were lead hands. The status of lead hands in this workplace, coupled with the fact that the petition was circulated during working hours at the work place, leads the Board to conclude that employees would have perceived this petition to be supported by or at least condoned by management.

Petition #2

19. On February 18, following the posting of the Board notice advising employees of the termination application and the terminal date for submitting evidence that employees do or do not wish to be represented by a trade union, the lead hand on the day shift, Robert Yake, called the employees together in the lunchroom. A discussion ensued and the employees decided to circulate a petition. Syed Hussain, an employee in the bargaining unit, drafted petition #2. It was in the form of a letter to the Board and stated "This is to inform you that we, the garage employees of Maple lodge Farms, department 610, opposes to be represented by the United Food and Commercial local union 175-633, form B-12, File No. 3721-93-R. Supplied below are the signatures of the garage employees opposing the union." Twenty employees signed this petition. Many of them had previously signed petition #1 and also signed petition #3. It is appropriate to note here that the Board's notice requesting employees to submit evidence that employees do or do not wish to be represented by the union refers to *additional* evidence, and is not intended to solicit those same employees who signed the original petition to submit *further* signatures.

20. Although Mr. Hussain wrote out the petition, he did not circulate it. Mr. Yake did. Mr. Yake is a lead hand on both single and double crews and he performs all the functions of a lead hand described above. Mr. Yake was the first to sign the petition and he then obtained the signatures of most of those on the shift. When he was not obtaining signatures, he kept the petition in his locker which was *probably* locked. He turned the petition over to the lead hand on the next shift to obtain more signatures. That lead hand did not testify. The petition was returned to him by yet another lead hand, who also did not testify. Two to three signatures were therefore obtained by persons who did not testify to the circumstances of those signatures, nor to the custody of the petition during that time. Mr. Yake then obtained the remaining signatures and delivered petition #2 to the Board. For the following reasons, the Board does not accept the voluntariness of petition #2.

21. For the same reasons as found by a previous panel of the Board, this panel finds that the active involvement of the lead hand Mr. Yake in the circulation of the petition during working hours would likely lead employees to believe that the petition was supported or condoned by management. The fact that Mr. Yake called the employees on his shift into the lunchroom for the purpose of obtaining signatures would have had a further coercive effect on employees.

22. Further, the petition was out of Mr. Yake's custody when he left it in his locker, which may have been unlocked. More importantly, it was out of his custody when he passed it on to a lead hand until it was returned by another lead hand.

23. Finally, the circumstances surrounding two to three of the signatures were unknown, as the applicant did not call the lead hands who obtained those signatures.

Petition #3

24. The circumstances giving rise to petition #3 are as follows. Following its usual practice, the Board edited petition #1 for confidentiality by blanking out the names and other identifying material of the employees who signed it. All that remained on petition #1, after editing, was the preamble. In place of the signatures on the first page, the Board typed in the words "11 signatures" and in place of the signatures on the second page, the Board typed in the words "6 signatures", to indicate the material which had been edited out. This information was circulated to the parties, including the applicant. The applicant misunderstood this document. He interpreted it as a request from the Board *to obtain* eleven signatures on the first page and six signatures on the second page. Although he was not scheduled to work that day, he took the document to work on February 18 to obtain the seventeen signatures. He obtained eighteen. Most, but not all, were employees who had signed the previous petitions. There was some confusion between Mr. Yake and Mr. Rioux's evidence as to whether Mr. Rioux arrived with his petition shortly before Mr. Yake called the above-mentioned meeting in the lunchroom to sign petition #2, or whether Mr. Rioux brought petition #3 in at a different time. In any event, it is clear that petition #3 also started circulating on February 18 and that Mr. Yake called the employees into the lunchroom to assist Mr. Rioux. Mr. Rioux signed the document first. Mr. Yake, the lead hand, signed second. He added the name of the union and its local to the preamble. Mr. Rioux witnessed all the remaining signatures over the course of three days. Mr. Rioux testified that there was very little discussion with the employees, although this time they expressed confusion and frustration over the fact that they were being asked to sign yet another petition. Mr. Rioux told them that the Board had asked him obtain more signatures. He was not able to give reliable evidence with respect to the circumstances surrounding any of the signatures. For the following reasons, the Board does not accept that petition #3 is a voluntary expression of the wishes of the employees.

25. First, Mr. Rioux was unable to recall with any degree of precision the circumstances surrounding the signatures he obtained on petition #3.

26. Second, the Board is not satisfied that the employees knew what they were signing when they signed petition #3. They were confused and frustrated at being asked to sign a third document. Very little discussion took place. They were advised that the Board had requested this petition.

27. Third, the lead hand, Mr. Yake was involved in the circulation of the petition, both by adding the union's name to the preamble and by calling the employees into the lunchroom to sign it. For the reasons expressed above, the involvement of the lead hand in this particular workplace invalidates the petition.

28. In light of the circumstances above, the Board does not accept that any of the petitions are the voluntary expression of the wishes of the employees. It is appropriate to note at this point, that there were no allegations of impropriety against the company and there was no evidence that the employer was in any way involved in any of the petitions.

29. The application is dismissed.

30. After the hearing the Board received a letter dated March 30, 1994, from an employee in the bargaining unit. The full text of the letter is reproduced below:

The Board's decision, resulting from the hearing, was that Local 175 will be the Collective Bargainer for the garage employees. This despite the collective bargaining to ratify the Union Contract had broken down twice in bitter dispute with a majority vote against. The main topic at the union meetings was that the majority of the employees did not wish to be represented by the Food and Commercial Union, as they appear not to have enough expertise in handling transport garages but rather represent food and catering concerns. We feel that there was misunderstanding as to the Union's capabilities at the time membership was initiated.

There is no "collective agreement" here, between the parties. We feel that the Board has made a sincere error in passing such a judgement.

The March 14 hearing was a closed hearing, which we understand is a practice under constant criticism since 1990. No closed ballot vote was taken by the Board from garage workers, which would be a very desirable operation in such a matter.

The Garage Employees, Department 610 of Maple Lodge Farms respectfully submit a request for an appeal to the Board's March 14 decision. We further respectfully request a reversal of that decision; that the United Food and Commercial Union, Local 175 be terminated as bargaining agents for these garage employees.

A copy of this letter has been forwarded to the Honourable Minister of Labour.

31. The Board interprets this as a request for reconsideration of its oral decision of March 14, 1994 to dismiss the application. The Board has decided to dismiss the application for reconsideration for the following reasons.

32. The basis of the Board's jurisdiction to reconsider its decisions is found in section 108(1) of the Act:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

33. As can be seen from this provision, the Board has a broad discretion to reconsider any of its decisions. However, the Board's jurisprudence is clear that there are sound legal and labour relations considerations for treating a Board decision as final and conclusive for all purposes unless there is a good reason to change it. Generally, the Board will not reconsider a decision unless an obvious error has been made; or a request for reconsideration raises important policy issues which have not received adequate attention or consideration; or the party requesting reconsideration proposes to adduce new evidence which it could not with the exercise of reasonable diligence have obtained or adduced previously, and which new evidence would, if accepted, have a material impact on the decision in question; or that a party seeks to make representations which it has had no previous opportunity to make.

34. The letter does not raise any issues which could not have been raised at the initial hearing. The basis of the request for reconsideration appears to be the fact that the union has failed to achieve a collective agreement with the employer and the Board made an error in finding that there was a collective agreement in place. Whether or not the union has reached a collective agreement is not a relevant factor to our decision. Further, the Board did not make any finding with respect to the existence of a collective agreement.

35. We wish to address the employee's concern that the hearing was "closed". This is not the case. The Board hearings are open to the public, as this one was. However, at the outset of the

hearing the responding party made a request for an order excluding witnesses. One of the primary purposes of excluding witnesses is to prevent witnesses who may testify later from hearing the evidence of earlier witnesses, in order to reduce the likelihood that later witnesses (whether intentionally or inadvertently) will tailor their evidence to fit with the earlier evidence. The Board ordered all witnesses excluded, except the parties and their advisors. Pursuant to that order, the applicant, Mr. Rioux was permitted to remain in the hearing room as was his chosen advisor, Mr. Yake. All other witnesses were requested to leave the room until they were called to give evidence. It was Mr. Rioux's decision to ask all the persons present in the hearing room on his behalf to leave, in case he needed to call them as witnesses.

36. Finally, with respect to the concern that "no closed ballot vote was taken", it should be noted that a vote will only be taken only if the applicant shows that at least forty-five per cent of the employees have voluntarily signified in writing that they no longer wish to be represented by the trade union (section 58(3)). For all the reasons discussed above, the Board has concluded that the signatures obtained on the three petitions are not voluntary. Therefore, the applicant is not entitled to a vote.

37. On April 7, the Board received a further petition bearing sixteen signatures which stated:

RE: MIN. OF LABOUR FILE #3721-93-R

WE, THE UNDERSIGNED GARAGE WORKERS EMPLOYED BY MAPLE LODGE FARMS LTD. RESPECTFULLY REQUEST AN APPEAL OF THE DECISION OF THE ONTARIO LABOUR RELATIONS BOARD WITH REFERENCE TO THE BOARD'S DECISION RE: OUR APPLICATION FOR THE TERMINATION OF BARGAINING RIGHTS OF THE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 175, AFL-CIO-CLC AS IT PERTAINS TO THAT PARTICULAR UNION REPRESENTING US.

38. Attached to the petition was the earlier letter from the employee in the bargaining unit dated March 30, 1994 and an unsigned copy of what appeared to be a draft collective agreement between the union and the employer.

39. The petition does not add any further reasons to the request for reconsideration dated March 30, 1994. The request for reconsideration is still denied.

40. In conclusion, the application is dismissed and the request for reconsideration is dismissed.

0200-94-M Madelene Alagano, Catalina Alvarez, Elizabeth Araujo, Eleen Buckley, Suzanna Cabral and Susan Chislett, Applicants v. **Miniworld Management**, Operating as North York Infant Nursery and Preschool, Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Trade Union - Trade Union Status - Employees discharged after signing letter setting out dissatisfaction with working conditions and asking employer to recognize them in representative capacity - Employees filing unfair labour practice complaint and seeking interim reinstatement - Employer asking Board to dismiss interim relief application and unfair labour practice complaint on ground that employees not engaged in trade union activity - Board satisfied that arguable case made out that employees attempting to establish association that might have acquired characteristics of "trade union" under the *Act* and that terminations motivated, at least in part, by their participation in effort to negotiate collectively with their employer - Balance of harm favouring granting relief - Interim reinstatement ordered

BEFORE: *S. Liang*, Vice-Chair.

APPEARANCES: *Michael Wright, Susan Chislett and Suzanna Cabral* for the applicant; *Martin Denyes, Myo Yoon and Brian Wylkynko* for the responding party.

DECISION OF THE BOARD; April 25, 1994

1. This is an application for interim relief made pursuant to the provisions of section 92.1 of the *Labour Relations Act*, and heard before me today. The applicants request that they be reinstated to their employment with Miniworld Management, Operating as North Yonge Infant Nursery and Preschool ("Miniworld" or "the employer"), on an interim basis, pending the disposition of a complaint filed under section 91 of the *Act*.

2. I have before me the application and response, and supporting declarations of Susan Chislett, Myo Yoon and Robin Caskenette.

3. Although there are certain factual disputes in the materials before me, there is also substantial common ground and matters which are not disputed. At the time of the events in question, there were nine employees of the day care centre operated by the employer under the name North Yonge Infant Nursery and Preschool, plus a supervisor. These employees decided that they wished to negotiate with the employer over the terms and conditions of their employment. The declaration of Susan Chislett states:

As a result of our discussions we decided to bargain collectively with Ms. Yoon. Though we are not represented by a trade union, we decided that we would have the greatest chance of success in improving our wages and working conditions if all of the employees bargained together. We decided to form an association for the purpose of collective bargaining and to request that Ms. Yoon recognize us as representing all of the employees at the North Yonge Infant Nursery and Preschool, with the exception of our supervisor. We drafted a statement setting out our dissatisfaction with our working conditions and myself and the other eight employees signed the statement. The statement noted that all of the employees felt that working conditions needed to be improved. We signed the statement on March 29, 1994.

4. A representative of the group, Susan Chislett, provided this statement to their supervisor on the following day. The day after this, Thursday, March 31, Ms. Chislett met with Myo Yoon, the owner. Ms. Yoon advised Ms. Chislett that she required a week or so to consider the

demands. On Tuesday, April 5, the employment of Ms. Chislett and Marie Di Prospero, a probationary employee, were terminated. The letter of termination to Ms. Chislett states,

Recently you have brought to my attention the fact that you are no longer satisfied with the terms of our original employment agreement. Unfortunately, at this time, I am unable to make any changes. I do feel however, that I am no longer able to work compatibly with you due to your dissatisfaction with your job. This has a negative effect on the running of the centre.

Therefore, I have made the decision to terminate your position with North Yonge Infant Nursery. I regret that you have been unhappy in your employment with us. In lieu of notice I will be paying you three weeks full pay. Your final pay cheque and severance [sic] pay along with separation papers will be mailed to you within three days.

5. The letter to Ms. Di Prospero states that her probationary period is coming to an end, and “[M]anagement feels at this time that we will no longer be employing you with our company.”

6. On the morning of April 6, the employees picketed in front of the day care centre in response to the terminations and in order to advise the parents of the working conditions. At approximately 2:30 p.m., the other seven employees had their employment terminated. Their letters of termination state:

This letter is to inform you that effective immediately your employment with North Yonge Infant Nursing Preschool is terminated. By not coming to work today you have shown willful neglect for your position at the centre. Your termination is effective April 6, 1994, tendered by this notice.

7. The declaration of Ms. Chislett states that some of her co-workers have advised her that they are too upset or afraid to return to work with the employer. As a result, only six of the nine employees who had their employment terminated are the applicants in the proceedings before me. Ms. Chislett also declares that if the interim order is not granted, her fear is that her co-workers will become so discouraged and afraid that their attempt to form an association for the purposes of collective bargaining will have been destroyed.

8. Section 92.1(1) of the Act provides:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

9. In *J.C.V.R. Packaging Inc.*, [1993] OLRB Rep. Nov. 1145, the Board discussed its approach to applications for interim orders:

13. In the Board's previous cases dealing with interim orders, the Board has discussed the place of interim relief in the context of alleged unfair labour practices: see, for example, *810048 Ontario Limited c.o.b. as Loeb Highland*, [1993] OLRB Rep. March 197; *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019. The Board has said that interim relief is warranted where it may serve to “neutralize the potential impact of an *alleged* unfair labour practice” (see *Tate Andale Canada Inc.*), preserve the right of the union to a meaningful remedy should the complaint be upheld (see *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. March 242) or preserve a “status quo” in order to provide some stability within which litigation over labour relations disputes may proceed (see *New Dominion Stores, a division of the Great Atlantic and Pacific Company of Canada, Limited*, [1993] OLRB Rep. Aug. 783).

14. Within this context, the Board's determinations under section 92.1 involve applying a two-step inquiry. Firstly, the Board assesses, on the basis of the materials before it, whether there is any apparent merit to the complaint which forms the basis for the request for interim relief. In this assessment, the Board in no way makes a finding or determination as to the *actual* merits of

the complaint - that is for the panel which hears the complaint to decide. Rather, the Board takes a preliminary view of the matter in order to assess whether, assuming that the facts relied upon by the applicant are true, the applicant has shown an arguable case for the relief sought in the main complaint.

...

17. The second assessment that I must make is whether assuming the applicant has shown an arguable case, the harm in *not* granting interim relief outweighs the harm of granting it, such that it would be more consistent with the purposes of the Act, the exercise of the rights under the Act, and the purposes of interim relief, to grant the orders requested.

10. In the case before us, the employer asserts that the applicants have not made out an arguable case that the Act has been violated. This is because the sections of the Act which the applicants state have been violated by the employer's actions speak to *trade union* activity. Here, it is clear even from the applicants' declaration that there is no issue of trade union representation in these facts. Counsel states that this would be quite a different case if there had been an organizing drive by a trade union.

11. Counsel for the employer submitted that simply engaging in collective action does not bring these applicants under the protection of the Act. The Act protects collective action taken within certain parameters. These parameters dictate that collective bargaining takes place through a trade union as that is defined in the Act. Further, to the extent that the Board assesses whether or not an organization should be accorded the status of a trade union in, for example, a certification application, the Board requires evidence of a structure with a constitution, officers, and members. Here, there is no such structure.

12. The employer also requests that the Board dismiss the complaint in Board File 0201-94-U as failing to make out a case, pursuant to Rule 24 of the Board's Rules of Procedure.

13. The employer raises an interesting issue, which is to what extent the Act protects employees who wish to negotiate collectively with their employer, without a yet- apparent trade union organization or formally created association representing them. There is no doubt that these employees have decided to bargain collectively with their employer. Does the absence of a formal structure through which these efforts have been made deprive them of their right not to be discriminated against, suffer reprisals or be discharged because of these efforts?

14. As I have stated, it is an interesting issue, and an important one as well. It is not at all apparent to me that there is *no* arguable case that these applicants are protected by the provisions of the Act. It is not apparent that when sections 67 and 71 speak of the protection of persons who are exercising their rights under this Act, that this protection only applies once an organization of employees has become sufficiently formalized that it would be granted "status" as a trade union in the context of a certification application. Indeed, such an interpretation of sections 67 and 71 might only encourage earlier intervention by employers who wish to avoid potential collective bargaining.

15. A trade union can be a very sophisticated and complicated entity, with thousands of members, or it may be something much less. The Act defines "trade union" as "an organization of employees formed for purposes that include the regulation of relations between employees and employers..." The Act also anticipates that a collective bargaining relationship can be established without a certification procedure under the Act or any determination by the Board.

16. On the materials before me, it appears that a group of employees in a small workplace have attempted, in a very rudimentary and preliminary fashion, to begin the process of organizing themselves for the purpose of negotiating terms and conditions of employment with this employer. It is not for me to decide whether, having heard the evidence and arguments of the parties, another panel of this Board may determine that the efforts by these employees take place entirely outside of the provisions of the Act. I am satisfied that there is at least an arguable case that sections 67 and 71 apply to the facts before me and that these employees were engaged, in their own fashion, in attempting to establish an association that might have acquired the characteristics of a "trade union" under the Act. I am also satisfied that there is at least an arguable case that the terminations of all of these employees was motivated at least in part by their participation in the effort to negotiate collectively with their employer (without seeking to ignore the employer's stated rationale for the termination of the remaining employees on April 6 after the picketing activity).

17. I also find that the balance of harm favours the granting of the relief. It is telling that only six of the nine employees who had their employment terminated have chosen to participate in these proceedings. It can hardly be surprising that these terminations have had an effect on the willingness of these employees to pursue further collective action. In a number of decisions, the Board has observed that there can be few actions as damaging to the willingness of employees to pursue self-organization than the discharge of union supporters or organizers: see, for instance, *Loeb Highland*, [1993] OLRB Rep. March 197. In *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019, the Board discussed the effects of such actions, and the role of interim relief in helping to offset these effects:

42. Where interim relief is sought in connection with an unfair labour practice complaint, one must keep in mind the legal rights and administrative processes that the law is intended to protect; or to put the matter another way, the rights and processes which the impugned conduct may (and may be intended to) undermine. In the context of a union organizing campaign, those rights include not only an *individual* right to choose without fear of reprisal, but also a correlative *group* right of self-organization, so that employees may establish a collective bargaining relationship in the manner contemplated by the statute. A remedial philosophy that focuses exclusively on repairing the harm to individual victims, and neglects the general assault on freedom of association, will inevitably fail to promote the statutory objective.

43. If the employer's purpose were only to punish the individual worker for supporting the union, the law might well redress the harm by restoring him/her to the job, and making up the income that s/he has lost. But if the real objective is to break the momentum of the organizing campaign, to eliminate an influential employee advocate, or to send a graphic message to other employees, the set-back to the employees' quest for a collective voice in the workplace may not be so readily remedied.

44. It is not easy to calculate the value of the employees' "lost opportunity" to make a fair and free choice about trade union representation. It is not easy to repair an administrative process that depends for its efficacy on the free exercise of employee wishes. It is not easy to assess the value of lost leadership in the formative stages of an organization - although it is perhaps self-evident that a voluntary organization, be it a club, church or trade union, depends upon the zeal and commitment of its core members. However intangible these qualities of energy or commitment may be, a voluntary organization like a trade union cannot form or function without them - particularly in its early stages when workers may be unfamiliar with their rights, when the statutory freeze or "just cause protection" may not yet have been triggered (see sections 81 and 81.2 of the Act) and employers may be more inclined to resist unionization, legally or illegally. For it is a sad fact of the industrial relations scene that almost fifty years after the employees' right to collective bargaining was entrenched in law, some employers continue to resist the exercise of those rights, or penalize employees who dare to do so. That is why section 111 of the Act preserves the anonymity of union supporters, lest their identification expose them to employer reprisals. If the Legislature had been confident that employees had nothing to fear, or Board remedies were a complete answer to illegality, it would not have shrouded the organizing pro-

cess with such secrecy (incidentally reversing, by statute, the decision of the Supreme Court of Canada in *Globe Printing Co.* [1953] 3 DLR 561).

45. A remedial approach that does not take into account these labour relations realities will necessarily be deficient, and to that extent ineffective, as either redress or deterrent.

46. Where the Board concludes that a breach of the Act has occurred, it is required to construct a *remedy* that is sensitive to these concerns and, insofar as possible, rectifies the labour relations status quo disrupted by the illegal act. Where the Board is called upon to grant *interim relief* in a “pending or intended proceeding”, it must consider whether an affirmative order is necessary either to neutralize the potential impact of an *alleged* unfair labour practice, or to enhance the Board’s ability to address the labour relations situation, whether or not an unfair labour practice has occurred.

47. It must be recognized that early intervention, stressing immediacy rather than severity, can have a powerful preventive effect and reduce the necessity for later more intrusive action. Whatever balance may commend itself in particular cases, self ordering is preferable to Board intervention, and an early, moderate response may encourage accommodation and may be preferable to a later, more intrusive one. It is in no one’s interest to encourage layers of litigation. If timely interim relief offsets the potential advantage of illegal action, discourages such action, promotes settlement or reduces the likelihood of further litigation, such results are all completely consistent with the statutory objective.

48. It is essential that Board orders - interim or final - be sensitive to the realities of the workplace; and one such reality is the employee’s ignorance of the law. One cannot realistically expect rank and file employees to be familiar with their rights under the *Labour Relations Act*. But one can be sensitive to their fears, and responsive to the concern that the law may favour those with economic power or the ability to act unilaterally. Accordingly, quite apart from the relief available to aggrieved individuals, there may be an independent value in an order that reassures other workers that the law stands above the fray, and proclaims that the legal result will rest on statutory principles, not the personality or relative power of the participants. In our system of industrial relations there is ample scope for the exercise of economic power, but it is not, and cannot be, the basis for resolving statutory rights.

18. Whether or not the events before me can be considered an “organizing drive”, there is nothing before me that suggests that these terminations will not cast the same kind of pall of the employees’ willingness to pursue collective self-organization, as they would if they had occurred within a more conventional trade union organizing drive.

19. The harm which the employer asserts will occur in the event of interim reinstatement is that “[c]hildren and parents have reacted negatively to the disruption caused by a change in staff and another change in staff could cause irreparable harm to the relationship between parents, children and the day-care”. I am not convinced that this outweighs the matters discussed above. In fact, it is not clear that, if the change in staff has been received “negatively” by children and parents, the return of the usual caregivers, the applicants, will be less beneficial than the continuation in employment of others who have only been employed for a few weeks.

20. For these reasons, I make the following interim orders, which are in effect until the disposition or resolution of the unfair labour practice complaint in Board File No. 0201-94-U:

- (a) an order reinstating Madelene Alagano, Catalina Alvarez, Elizabeth Araujo, Eleen Buckley, Suzanna Cabral and Susan Chislett to employment, forthwith;
- (b) an order that the Board Notice as set out in Appendix A shall be posted in conspicuous places in the workplace. The Notice shall

remain posted for 60 working days or until the disposition or resolution of Board File No. 0201-94-U, whichever is earlier.

Appendix "A"

The Labour Relations Act

NOTICE TO EMPLOYEES

Posted by Order of the Ontario Labour Relations Board

THE BOARD HAS ORDERED MINIWORLD MANAGEMENT, OPERATING AS NORTH YORK INFANT NURSERY AND PRESCHOOL TO REINSTATE MADELENE ALAGANO, CATALINA ALVAREZ, ELIZABETH ARAUJO, EILEEN BUCKLEY, SUZANNA CABRAL AND SUSAN CHISLETT UNTIL THE BOARD DECIDES WHETHER THEIR DISCHARGES WERE LEGITIMATE.

A HEARING BEFORE THE BOARD IS SCHEDULED TO BEGIN ON MAY 10, 1994. THE PURPOSE OF THAT HEARING IS TO DETERMINE WHY THE ABOVE EMPLOYEES WERE DISCHARGED.

IF THE BOARD IN THE END DECIDES THAT THE REASONS FOR THE DISCHARGES HAD NOTHING TO DO WITH THE EXERCISE OF RIGHTS UNDER THE LABOUR RELATIONS ACT, THEN THE TEMPORARY REINSTATEMENT ORDER WILL BE REVOKED AND THE COMPANY WILL NO LONGER HAVE TO EMPLOY THEM.

IF THE BOARD IN THE END DECIDES THAT THE DISCHARGES OCCURRED BECAUSE THE EMPLOYEES WERE EXERCISING RIGHTS UNDER THE ACT, THE BOARD MAY CONFIRM THE TEMPORARY ORDERS.

EMPLOYEES IN ONTARIO HAVE THESE RIGHTS WHICH ARE PROTECTED BY LAW:

AN EMPLOYEE HAS THE RIGHT NOT TO BE DISCRIMINATED AGAINST OR PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BY AN EMPLOYER OR A TRADE UNION OR A REPRESENTATIVE OF AN EMPLOYER OR A TRADE UNION BECAUSE HE OR SHE IS EXERCISING RIGHTS UNDER THE LABOUR RELATIONS ACT.

AN EMPLOYEE HAS THE RIGHT TO JOIN A TRADE UNION OF HIS OR HER OWN CHOICE AND TO PARTICIPATE IN ITS LAWFUL ACTIVITIES.

AN EMPLOYEE HAS THE RIGHT NOT TO BE PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING BECAUSE HE OR SHE PARTICIPATED IN A PROCEEDING UNDER THE LABOUR RELATIONS ACT INCLUDING ATTENDING A HEARING AS A WITNESS OR A POTENTIAL WITNESS.

AN EMPLOYEE HAS THE RIGHT TO REMAIN NEUTRAL, TO REFUSE TO SIGN DOCUMENTS OPPOSING A UNION OR TO REFUSE TO SIGN A UNION MEMBERSHIP CARD.

IF AN EMPLOYEE IS PENALIZED OR THREATENED OR FORCED TO DO ANYTHING OR NOT TO DO ANYTHING FOR EXERCISING ANY OF THESE RIGHTS, A COMPLAINT MAY BE FILED WITH THE ONTARIO LABOUR RELATIONS BOARD.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 60 consecutive working days.

DATED this 25TH day of APRIL, 1994.

3593-93-G; 3594-93-G International Union of Elevator Constructors, Local 50, Applicant v. Otis Canada Inc., Responding Party; International Union of Elevator Constructors, Local 50, Applicant v. **Montgomery KONE Elevator Co.**, Responding Party

Construction Industry - Construction Industry Grievance - Board finding that collective agreement requires employer to pay \$70 travel allowance, regardless of whether or not an employee who works a day in "zone" incurs accommodation expense on night following work assignment - Grievances allowed

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *G. O. Shamanski* and *J. Redshaw*.

APPEARANCES: *Eric Del Junco* for the applicant; *R. Ross Dunsmore*, *A. Reistetter*, *E. Wyzykowski* and *Patrick Clifford* for Otis Canada Inc.; and *R. Stinson*, for Montgomery KONE Elevator Co.

DECISION OF THE BOARD; April 12, 1994

1. The applicant has referred two grievances concerning the interpretation, application, administration or alleged violation of a collective agreement to the Board for final and binding determination.
2. The applicant and the responding parties Otis Canada Inc. ("Otis") and Montgomery KONE Elevator Co. ("Montgomery KONE") are bound by a provincial collective agreement between the National Elevator and Escalator Association and the International Union of Elevator Constructors ("IUEC"), effective July 20, 1992 to April 30, 1995.
3. Pursuant to the terms of that collective agreement, a grievance was filed by the IUEC Local 50 against Otis on January 17, 1994, on behalf of three employees, William Bryce, Mike White and Peter McIntyre. The grievance alleges that Otis refused to pay the sum of \$70.00 per day to these three employees as per Article 12.05.01(d) of the provincial agreement.
4. A second grievance was filed by IUEC Local 50 against Montgomery KONE on January 20, 1994, on behalf of two employees, Don Gorelle and Darrell Cherry, alleging that the employer failed to pay \$70.00 per day to these employees pursuant to Article 12.05.01(d). At the request of the applicant, the referrals to arbitration of these two grievances were combined and heard together.
5. Both parties directed their arguments to the language of the entire article, so Article 12.05 of the provincial agreement is reproduced below:

12.05 TRAVEL ZONES AND TIMES WITHIN THE PRIMARY AND SECONDARY JURISDICTIONS

12.05.01 LOCAL 50 - TORONTO

(a) It is agreed that all employees covered under this agreement who are working on construction or modernization or scheduled repair work in the area bounded in the north by Highway 401, in the east by Port Union Road, and in the west by Highway 427 and in straight line to the North Shore of Lake Ontario shall be reimbursed in the amount of thirteen dollars (13), per day employee, effective July 20, 1992. Effective May 1, 1993 the employee shall be reimbursed fourteen dollars (14) per day and effective May 1, 1994 the employee shall be reimbursed in the amount of fifteen dollars (15) per day.

(b) It is further agreed that all employees covered under this agreement who are working on construction, modernization or scheduled repair in the area between the present boundaries (highway 401, Port Union Road and Highway 427) and the limit of a forty (40) mile radius from the City Hall, Toronto, shall be reimbursed thirty (30) minutes each way, per day as a total expense renumeration.

(c) It is further agreed that the allowances referred to in (a) and (b) above are not applicable to work performed by any classification of employee not specifically mentioned in (a) and (b) nor shall they be applied to areas other than those specified in (a) and (b).

(d) In the area between the forty (40) mile radius from the City Hall, Toronto, as described in (b) above, and a radius of one hundred and fifty (150) miles from the City Hall, Toronto, each employee assigned to work in the area shall be reimbursed seventy dollars (\$70.00) per day worked, effective on date of signing.

(e) In any area beyond the one hundred and fifty (150) mile radius as described in (d) above, each employee assigned to work in the area shall be reimbursed four hundred and ninety dollars (\$490.00) per week for each full week assigned. In the event that the employee spends less than a full week during any period of assignment in the area described in this paragraph, he shall be reimbursed for such period of less than one week's duration at the per diem rate as specified in (d) above.

(f) It is understood that, should the amounts specified in paragraphs (d) and (e) be deemed insufficient to provide reasonable compensation for food, shelter, and incidental expenses for the employee concerned, the amounts may be adjusted by agreement between the Employer and the Union. The Employer may require that legitimate receipts be furnished by the employee to substantiate such request for increased compensation. It is further agreed that where the actual expenses fall below the amounts now agreed on, the amount may be adjusted by agreement between the Employer and the Union.

12.05.02 Local 90 - Hamilton

(a) Anything over one city bus fare within the primary jurisdiction must be paid by the Employer at the rate of one dollar (\$1.00) per day per man.

(b) Travel zones and travelling times within the secondary jurisdiction with the City Hall as the central point, shall be as follows:

From the primary to 7-3/4 miles
- 1/4 hour each way

from 7-3/4 miles to 10 miles
- 1/2 hour each way

from 10 miles to 15 miles
- 3/4 hour each way

from 15 miles to 25 miles
- 1 hour each way

It is understood that the employees will start work at the job site in the respective zones at eight (8:00) a.m. and shall work eight hours per day on their job site.

It is agreed that Local 90 of the City of Hamilton has jurisdiction over the men now resident in the Cities of Windsor, London and Sarnia, and all men who might be permanently stationed in these cities during the life of this Agreement, and the men resident in these cities shall have local preference whenever possible on any work covered by this Agreement.

(c) Living Expenses

When men are sent outside of the secondary jurisdiction, expenses shall be paid at the rate of up

to seventy (\$70.00) per man per day for all days worked to cover room, board, laundry and incidental expenses within a zone of sixty-five (65) miles from the City Hall.

Beyond this zone, such expenses will be paid at the rate of up to four hundred and ninety dollars (\$490.00) per man per week.

In the event men work less than a five-day week, the expenses rate shall be up to seventy dollars (\$70.00) per day.

All zones referred to in the secondary jurisdiction covering travel times and expenses shall be designated on an approved map.

If at any time it is found that the living allowance provided by this Agreement is not adequate to cover reasonable expenses, the Company agrees to increase same proportionately after the increase has been approved by the superintendents in charge, along with the representatives of the Union. It is also understood that, where expenses fall below the allowance agreed on, the Company reserves the right to pay only the costs involved.

12.05.03 Local 96 - Ottawa

(a) Travel zones and per diem allowances shall be as follows:

From the primary to 8 miles	- 15 minutes each way
from 8 to 11 miles	- 30 minutes each way
from 11 to 15 miles	- 45 minutes each way
from 15 to 25 miles	- 60 minutes each way

(b) It is understood that the per diem expenses detailed in paragraph (a) above are applicable only to employees engaged in Construction, Modernization and Scheduled Repair Work, and that employees shall perform eight hours work per day on the job site.

(c) It is agreed that Local 96 of the City of Ottawa has jurisdiction over the men resident in the City of Kingston. Also, all men who might be permanently stationed in this City during the life of this Agreement, and that members of Local 96 of Ottawa shall have prior right to all work covered by this Agreement whenever possible.

(d) It is agreed that when employees are sent to camp site jobs they shall be accommodated in foremen's quarters where possible. Out-of-pocket expenses for employees sent to such job sites will be discussed between the Employer's Superintendent and a representative of the Local at least one (1) week prior to the employee's departure to the job site.

(e) When employees are sent outside of the primary jurisdiction where living expenses apply, such expenses shall be paid at the rate of up to a maximum of seventy dollars (\$70.00) per man, per day worked to cover room, board, laundry and incidental expenses in an area within a sixty-five (65) mile radius of the Chateau Laurier Hotel.

Beyond this area such expenses shall be paid to a maximum of four hundred and ninety dollars (\$490.00) per week.

If at any time it is found that the living allowances provided by this Agreement are not adequate to cover reasonable expenses, the Employers agree to increase same proportionately after such increase has been approved by the Employer's Superintendent concerned, along with a representative of the Local. It is further agreed that when actual expenses fall below the amounts agreed upon, the Employers reserve the right to pay only the costs involved.

6. The parties were able to agree to certain of the facts relating to the grievances, so no oral evidence was called at the hearing. The following facts concerning the circumstances giving rise to the grievances were stipulated to:

(a) during the six to eight month period before the grievances were filed, each of the five

grievors submitted at least one claim for a \$70.00 allowance pursuant to Article 12.05.01(d);

- (b) on at least one of these occasions, the employer denied a claim for the \$70.00 allowance made by each of the five employees;
- (c) on the occasions on which the denials occurred, the employees were all working within the geographic area defined in Article 12.05.01(d) as between 40 and 150 miles from City Hall, Toronto ("the zone");
- (d) on the occasions on which the denials occurred, the Otis employees were engaged in maintenance work and the Montgomery KONE employees were performing repair work;
- (e) the denials all occurred in one of two different circumstances:
 - (i) on a single-day trip, where an employee travelled into the zone, worked the day and then returned back to Toronto on the same day; or,
 - (ii) on the last day of a multi-day trip, where the assignment involved two or more days of work in the zone. On these occasions the employers paid the \$70.00 per day allowance for all days except for the last day of the trip, at the end of which the employee returned to Toronto;
- (f) on both single-day trips and on the last day of multi-day trips the employees incurred expenses for meals;
- (g) neither employer ever approached the union to enter into an agreement to reduce the amount payable in these circumstances pursuant to the provisions of Article 12.05.01(f), and no such agreement was ever made.

7. While we were asked to rule on the application of the language in the provincial agreement to these general facts, we were also provided with specific examples of recent refusals of claims made by the employees named on the grievances. We were told, and documents were filed to confirm, that the grievors Cherry and Gorelle worked in Barrie on Wednesday, Thursday and Friday, January 5, 6 and 7, 1994 at the Royal Victoria Hospital for 8 hours per day. Both grievors claimed and were paid for one and one-half hours of travel time each way; Gorelle was also paid \$77.60 for mileage. They each also claimed the \$70.00 allowance for each of the three days. They were paid for the first two days and their claims for Friday were denied.

8. Similarly, we were told that the grievors McIntyre and White travelled to Peterborough on January 5 and 8, 1994, respectively, on single-day trips, working 8 hours on each occasion. For January 5, 1994, McIntyre claimed and was paid four hours travel time and \$123.24 for mileage; for January 8, 1994 White claimed and was paid three hours of travel time. The claims of each employee for the \$70.00 allowance were denied.

9. In addition, certain facts were stipulated to which related to the past practice of the two employers in dealing with claims for the \$70.00 travel allowance. While the parties did not agree as to the probative value of this evidence or the conclusions to be drawn from it, they did agree on the following additional facts:

- (a) neither employer has ever required employees to provide actual proof of expenses as a condition of payment of the \$70.00 allowance, or indeed of payment of any of the allowances set out in paragraphs (a) through (d) of Article 12.05.01;
- (b) the five employees who are grievors in the present referral were not asked to and did

not provide receipts for actual expenses after their claims were refused in 1993 and 1994;

(b) Otis refused claims made by the grievors McIntyre and White for the \$70.00 travel allowance in one of the two circumstances described in paragraph 6(e) above on fifteen occasions in 1993;

- (c) on two other occasions in 1993 Otis approved payment of the \$70.00 allowance to these two employees where they made single day trips to the zone;
- (d) on four further occasions in 1993 the grievor Bryce travelled to Peterborough on single day trips, claimed and received payment for travel time and mileage, but did not claim the \$70.00 allowance; and,
- (e) on the occasions prior to those in January, 1994 on which the employer refused to pay the \$70.00 allowance, the union had discussions with Otis and took the position that the employees were entitled to the allowance, but no formal grievances were filed until the two which are the subject of the present referral.

10. The issue before us is essentially whether or not the language of Article 12.05.01(d) entitles employees to payment of the \$70.00 allowance for days on which they do not spend the night away from home at the end of the day's work. On its face, the language does not require employees to stay away from home or incur accommodation expenses in order to qualify for the *per diem* allowance, but only to work for a day in the geographic area delineated. The employer argues, however, that it is implicit in the language of the Article as a whole that the amount set out is intended to be a "normal" amount for food, shelter and incidental expenses incurred by travelling employees, which can be reduced, or indeed increased, where the actual expenses of an employee vary substantially from that amount.

11. It is true that Article 12.05.01(f) appears to establish a procedure for varying the amount of the allowances set out in sub-paragraphs (d) and (e), which refer to per diem and weekly rates respectively. The employer argues that the presence of and the language of this section suggests that the \$70.00 rate only applies if it is "reasonable" having regard to the actual expenses incurred by the employee. As such, if the employer knows that the employee did not stay overnight (which they will know once an employee claims either travel time or mileage for the same day) then it is fair for the employer to decide not to apply that amount and to reject the employee's claim. The process once the claim has been rejected, according to the employer, is for the employee to provide proof of actual expenses totalling to \$70.00 (or presumably for some lesser amount which might then be approved and paid).

12. This interpretation of Article 12.05.01(f), however, cannot be supported by a close reading of the language of that section. The paragraph begins by noting that "should the amounts specified in paragraphs (d) and (e) be deemed *insufficient* to provide reasonable compensation for food, shelter, and incidental expenses for the employee concerned, the amounts may be adjusted by agreement between the Employer and the Union" (emphasis added). It goes on to provide that "(t)he Employer may require that legitimate receipts be furnished by the employee to substantiate *such request for increased compensation*" (emphasis added). Thus, a clear process is established for a request by an employee to increase the amount of the per diem or weekly allowances where the actual expenses incurred are greater than the amounts established by the agreement. It is interesting to note that the consent of not only the Employer but also the Union is required in order for such increased payment to be made, possibly to avoid charges of favouritism where the rate established by the agreement is varied for a particular employee.

13. It is equally clear on the language set out above that the process described by the first two sentences of sub-paragraph (f) does not apply to a situation where the employer feels that the

per diem or the weekly amount is too generous. Both sentences refer specifically to the situation where the amounts set out in the agreement are considered to be *insufficient* and the employee is requesting an *increase* in the allowance. The opposite situation is, however, referenced in the final sentence of sub-paragraph (f), which provides that “where the actual expenses fall below the amounts now agreed on, the amount may be adjusted by agreement between the Employer and the Union”. This language clearly limits the employer’s right to substitute a lesser amount than the \$70.00 established by the agreement to situations where the consent of the the Union has been obtained, and does not permit the employer to require employees to prove their actual expenses as they are specifically mandated to do where an employee requests an increase in the general per diem rate.

14. Thus, the language of Article 12.05.01(f) only confirms the plain meaning of sub-paragraph (d) that an employee is entitled to claim the \$70.00 allowance whenever he works a day in the zone, irregardless of whether or not he has actually incurred that amount in expenses and without being required to provide receipts to prove his actual expenses. The only exception to that section offered by sub-paragraph (f) is where the employer and the union agree that the amount can be varied.

15. The employer submitted that the union was unreasonably withholding its consent to a reduction in the amount where employees’ expenses could be presumed to be much less than \$70.00 because no accommodation expense had been incurred. However, it was admitted that there has been no request by the employer to the union to negotiate a lesser amount, and there was no evidence as to the nature of discussions between the parties and in particular their positions as to whether a reduction was appropriate in these cases. Given these facts, it is impossible for us to conclude, as the employer has asked us to do, that the union is unreasonably taking the position that it won’t agree to a reduced amount unless it “feels” like doing so.

16. In fact, the employer relies upon sub-paragraph (f) to suggest that the responsibility falls to the employee and/or the union to justify payment of the \$70.00 allowance in circumstances where the employee does not incur accommodation expenses. This is clearly not the case, given that the \$70.00 payment is established as the norm by the language of sub-paragraph (d), without reference to a requirement that the employee stay out of town. If the employer feels that it is justified in a particular case in not paying the full amount, it is incumbent upon them to seek the agreement of the union to vary the amount as established by sub-paragraph (f), in the same way that an employee must initiate the process for obtaining the approval of both the employer and the union where he wishes to claim an increased amount.

17. The union argues, and we agree, that this process is to be contrasted to that established for the other two locals covered by the provincial agreement. Article 12.05.02(c) of the agreement, entitled “Living Expenses”, provides specifically for the payment of “room, board, laundry and incidental expenses” at the rate of \$70.00 per day for the employees of Local 90 in Hamilton when they travel to a comparable “zone”. The last sentence of that sub-paragraph provides that “where expenses fall below the allowance agreed on, the Company reserves the right to pay only the costs involved”. The same language appears in Article 12.05.03(c) and applies to the employees of Local 96 in Ottawa. We cannot agree with the argument of counsel for the employer that we should presume that a similar reservation is implied for the Toronto local; on the contrary, the existence of quite different language in the provisions applying to Local 50 demonstrates that a different deal applies for those employees, requiring the consent of the union as explicitly stated.

18. The evidence of past practice at Otis is not helpful in interpreting the language of Article 12.05.01(d). First, it is not consistent and thus does not establish a clear practice. Secondly,

there is insufficient evidence of agreement or even acquiescence by the union to permit the use of the practice evidence as an aid to interpretation or to mount an argument of estoppel. At most, it establishes that Otis has been moving throughout 1993 towards a consistent position that the \$70.00 allowance will not be paid in the circumstances set out in paragraph 6(e) above, which position has been challenged by the union as a violation of the provincial agreement.

19. Finally, the employer relies upon a B.C. arbitration decision on a similar grievance, *Otis Elevator Co. Ltd. v. International Union of Elevator Constructors, Local 82* (decision of R.B. Bird, January 4, 1978). In that case, an employee was assigned to work in Kelowna, which fell outside the secondary jurisdiction, or "zone", of the Vancouver local of which he was a member. He did not, however, incur any accommodation expenses arising from travel, such as hotel costs, as he lived in Kelowna, and the employer therefore denied him payment of the \$140.00 per week allowance established by the agreement for work beyond the zone.

20. Counsel for the employer cited several portions of the conclusions of the arbitrator which seem to support his argument that an employee can be required to provide proof of actual expenses before being paid the allowance, and that the amount paid must be "reasonable" having regard to those actual expenses. It is important to note, however, that the collective agreement in this case contained very different language describing the process for adjustment of the allowance, in paragraph 3(a)(i):

...

(i) If at any time it is found that the living allowance provided by this Agreement is not adequate to cover reasonable expenses which are actually incurred, the employer agrees to reimburse the employee for such actual expense. It is also agreed that where the actual expenses fall below the above- stated allowance, the employee will only be reimbursed for his actual cost. These adjustments, if application, are meant to apply to all areas in excess of 75 miles from City Hall and to such portions of that secondary jurisdiction between the "brown travelling zone" and the 75 mile radius which may qualify for additional reimbursement of expenses. However, the employer is given the option of paying for the subsistence of his employee at a first-class commercial establishment in any area between the "brown travelling zone" and the 75 mile radius if the employer deems such option to be in his best interest.

21. This language grants the employer full discretion to substitute the actual cost for the amount of the allowance where actual expenses fall below the amount specified in the agreement. Notably, it makes no reference to agreement by the union. On the other hand, the employer retains no discretion as to whether or not an increased amount will be paid when the allowance is not adequate to cover living expenses. This language, and the process it establishes, is substantially different from the language in the provincial agreement which we are asked to interpret, and the conclusions of the arbitrator are therefore not persuasive.

22. For all of these reasons, the grievances of the union on behalf of the five grievors are allowed. We find that the language of Article 12.05.01(d) requires that the employer pay the \$70.00 travel allowance in the circumstances described in paragraph 6(e) above, irregardless of whether or not an employee who works a day in the "zone" incurs accommodation expenses on the night following the work assignment, unless an agreement to pay a lesser amount is reached between the union and the employer.

23. The parties have asked that we not make any award as to compensation at this time, but remain seized as to any outstanding issues relating to compensation if they are unable to agree between them on the amounts payable as a result of our decision on the merits. We will remain seized for this purpose.

0924-93-G; 0925-93-U International Union of Elevator Constructors, Local 50, Applicant v. **Otis Canada, Inc.**, National Elevator and Escalator Assoc., Responding Parties

Construction Industry - Construction Industry Grievance - Discharge - Employer seeking to assign mechanic's work to "Helper" following completion of apprenticeship - Union refusing to issue "mechanic's card" - Employer advising grievor that if he did not work as "mechanic" he would be deemed to have quit - Board finding that employer's request that grievor work as mechanic without union referral violating collective agreement - Board concluding that grievor did not resign, but was discharged without just cause - Grievance allowed

BEFORE: *Inge M. Stamp*, Vice-Chair, and Board Members *G. O. Shamanski* and *H. Kobryn*.

APPEARANCES: *B. Chercover*, *T. McCann*, *R. Baxter*, *C. Murray* and *K. Ridley* for the applicant; *M. Patrick Moran*, *Ed Wyzykowski* and *Andy Reistetter* for the responding parties.

DECISION OF VICE-CHAIR, INGE M. STAMP AND BOARD MEMBER H. KOBRYN; April 29, 1994

1. The application under section 91 of the *Labour Relations Act* and the Referral of Grievance to Arbitration Under section 126, Construction Industry rely on the same material facts as pleaded in Schedule A of each application.

2. The applicant alleges the responding party has violated sections 3, 65, 67 and 71 of the Act and Article 10 of the collective agreement. The above mentioned sections of the Act provide as follows:

3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

3. The relevant articles in the collective agreement are:

2.03 Without limiting the generality of the foregoing, and subject to the other provisions of the Agreement, the Employers shall have the right to:

- (a) Select personnel, hire, assign work or duties, transfer, layoff and recall employees;
- (b) discipline or discharge for just cause;
- (c) establish and enforce reasonable rules of conduct to be observed by employees.

3.01 All Mechanics and helpers covered by this Agreement shall as a condition of employment, obtain and maintain membership in a Local Union of the International Union of Elevator Constructors following completion of the probationary period as defined in Article 10.

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ARTICLE 10

TRAINING - QUALIFICATION - EMPLOYMENT - LAYOFF - RECALL

10.01 It is agreed by the Union that there shall be no restrictions placed on the character of work which a Helper may perform under the direction of an Elevator Constructor Mechanic. (However, a Helper on Maintenance work is subject to the provisions of Article 9).

10.02 The total number of Helpers employed shall not exceed the number of Elevator Constructor Mechanics on any one (1) job, except on jobs where two (2) teams or more are working, one (1) extra Helper may be employed for the first two (2) teams and an extra Helper for each additional three (3) teams.

Further, the Employer may use as many Helpers as best suits his convenience under the direction of a Mechanic in wrecking old plants and in handling and hoisting material; and on foundation work. When removing old and installing new cables on existing elevator installations, an Employer may use two (2) Helpers to one (1) Mechanic.

10.03.01 PROBATIONARY HELPER I: A newly hired employee without elevator experience shall be classified as a probationary employee in the status of Probationary Helper I for a period or periods totalling six (6) months within the aggregate period of not more than nine (9) months.

The probationary period may be worked with more than one Employer. He shall be at least 18 years of age, physically fit and possess a high school certificate or its equivalent education. He shall receive 55% of the Mechanic's rate.

10.03.02 PROBATIONARY HELPER II: Upon completion of six (6) months in the industry, to the satisfaction of the Employer and the Union, a Probationary Helper shall be re-classified as a Probationary Helper II. For further advancement in the industry, he shall be obligated to successfully complete the recognized courses of training as designated by the local area committee under the direction of the National Board of Trustees of the C.E.I.E.P., if available.

10.03.02 He shall receive 60% of the mechanic's rate and shall be entitled and be required to participate in and make contributions to the Welfare Plan and the Pension Plan as provided for in this Agreement. He shall also be entitled to enroll in the Canadian Elevator Industry Educa-

tional Program. The Trustees of the Plans and the Program shall be requested to make any and all amendments or arrangements necessary to accomplish this.

The Employer and the Union shall have the privilege of testing the ability of a Probationary employee during this twelve (12) month period. If they agree that the employee during this probationary period does not display sufficient aptitude to become a Helper he shall be discharged. No such discharge shall be construed as a grievance by either party.

10.04 HELPER I: Upon completion of twelve (12) months in the industry the employee will be re-classified as a Helper I. For further advancement in the industry he shall be obligated to successfully complete the recognized courses of training as designated by the local area committee under the direction of the National Board of Trustees of the C.E.I.E.P., if available.

The Helper I, shall remain in this classification for a further twelve (12) months in the industry. He shall receive 70% of Mechanic's rate.

10.05 HELPER II: Upon completion of twenty-four (24) months in the industry the helper I shall be re-classified as a Helper II. For further advancement in the industry he shall be obligated to successfully complete the recognized courses of training as designated by the local area committee under the direction of the National Board of Trustees of the C.E.I.E.P., if available. Courses are modules 1 to 7 and 15 of the C.E.I.E.P.

He shall receive 75% of Mechanic's rate. The Helper II, shall remain in this classification for a further period of twelve (12) months in the industry.

10.06 IMPROVER HELPER: Upon completion of thirty-six (36) months in the industry, a Helper II shall be re-classified as an Improver Helper. For further advancement in the industry he shall be obligated to successfully complete the recognized courses of training as designated by the local area committee under the direction of the national Board of Trustees of the C.E.I.E.P., if available. Courses are modules 1 to 8 and 15 of the C.E.I.E.P.

The Improver Helper shall remain in this classification for a further period of twelve (12) months in the industry. He shall receive 80% of Mechanic's rate.

10.07 MECHANIC: upon completion of forty-eight (48) months in the industry and successful completion of the C.E.I.E.P., an Improver Helper shall write the Mechanic's exam as set out by the C.E.I.E.P. Trustees. Examinations shall include modules 1 to 8 and 15 of the C.E.I.E.P., plus questions on the Canadian Elevator Code, Print Reading, Hydraulics and Escalators.

A Mechanic's exam shall be administered at least once every twelve (12) months in each local in Ontario.

10.08 The "recognized courses of training" above, include compulsory tests which must be passed to advance to the next classification. Failure at any level in the progression will result in loss of advancement in the industry. If the test is failed once the Helper shall re-apply to write the test again after six months, but before twelve months.

A Helper who fails the test twice at the same level will be reduced to and paid as a Helper I. A Joint Education Committee shall be appointed consisting of three representative from the Employers and three Representatives from the Local Union. This committee shall develop and periodically up-date standardized Helpers and Mechanic's exams under the direction of the National Board of Trustees of the C.E.I.E.P.

No Helper may qualify to be raised to the next classification until he has worked the prescribed periods and passed the examinations administered by the Joint Education Committee.

The periods mentioned in the foregoing shall be aggregate periods and may be worked with more than one Employer.

10.09 TEMPORARY MECHANIC: Shall mean the Improver Helper who may be raised to the

status of Temporary Mechanic under Agreement of his Employer and the Union Representative.

If an Improver Helper is raised to the status of Temporary Mechanic he may remain as a Temporary Mechanic as long as satisfactory to the Employer and the Union, provided that there are no Mechanics unemployed.

Helper II and then Helper I may be raised to Temporary Mechanics, provided that all Improver Helpers are working as Temporary Mechanics, under Agreement of the Employer and the Union.

10.10 An individual with previous elevator experience may be hired as a Helper or Mechanic by agreement with the Union and the Employer.

10.11 A Joint Employment Committee comprised of an equal number of employer representatives from the industry and from the Local Union shall be appointed in each locality.

10.12 The primary purpose of the Committee shall be to establish and keep current an open list of individuals who are fully qualified to perform the work required in the industry, or who are being trained in the work of the industry, or who have apparent potential for such training. This open list shall be established and kept current on a non-discriminatory basis and without regard for membership in the Union. The Joint employment Committee (co-ordinating its work with the Education Committee, the joint Examining Committee and with governmental and outside agencies as it deems advisable), shall develop policies and procedures designed to attract and retain a competent and stable workforce in the industry.

10.13 An employer shall use the Local Union as a first source of job applicants. In the event that the Local Union is unable to satisfy satisfactorily the employer's request within three (3) working days, the employer may obtain applicants from any other available source. Before commencing work such applicants will obtain a referral slip from the Local union which shall be granted by the Local Union. The Employer has the right to reject any applicant referred to him by the Local Union, however, a claim that the Employer has unreasonably rejected such an applicant may be the proper subject matter of a grievance.

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ARTICLE 18

EDUCATION FUND

18.01 The parties to this Agreement do hereby agree to maintain an Educational Trust Fund to be administered by a Board of six (6) Trustees; three (3) appointed by the Employers and three (3) appointed by the International Union of elevator Constructors. The Education Trust Fund shall be known as the "Canadian Elevator Industry Educational Program" and shall provide a program for educating and training Elevator Constructor Mechanics and Helpers.

18.02 The Board of Trustees shall have full authority and discretion to adopt an Agreement and Declaration of Trust and an educational and training program which shall become part of this Agreement and binding on all parties signatory to this Agreement.

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4. The applicant alleges the responding party sought to avoid the union hiring hall and to interfere with the administration of the union and the representation of employees by the union. After eight days of hearing evidence from a number of witnesses the core facts are not in dispute. The dispute arose out of a disagreement over the interpretation of the collective agreement as to who controls the point in time when an apprentice who has passed his written exam and otherwise has fulfilled the necessary requirements is eligible to work as a mechanic. In other words can the

employer assign “mechanic’s” work to the person who has successfully completed all the required stages without that person first obtaining a card or referral from the union.

5. Keith Ridley had been working for the responding party for approximately four and a half years when he had completed the various stages necessary to write his mechanic’s exam. Upon successfully completing his exam the employer assigned Ridley to perform mechanic’s work. Ridley went to the union to get his “mechanic’s card” in order to perform mechanic’s work. The union refused to issue such a card because of its policy that while qualified unemployed “card” mechanics were out of work no new “cards” would be issued. In other words persons who would be entitled to be elevated to the status of “mechanic” had to wait to be referred out as mechanics until the list of unemployed mechanics cleared the hiring hall. The term “card mechanic” does not appear in the collective agreement.

6. The union clearly takes the position that it controls the issuance of the “Card” without which Keith Ridley cannot work as a mechanic. The employer is equally certain that it can assign mechanics work to a person who is already in its employ provided he/she has complied with all the necessary requirements and passed the mechanic’s exam. Ridley was caught in the middle of this dispute over the interpretation of the collective agreement. The employer advised Ridley that there was no longer any helper work available and if he did not work as a mechanic he would be deemed to have quit. The union’s constitution provides for fines of \$2,000, expulsion, or suspension of membership, etc. if members do not obey “all directives and orders of the International and Local Union” or to “obey the Constitution and By-Laws” of the union. This was a “no-win” situation for Keith Ridley, a “Catch 22”.

7. Ridley went back and forth several times between the employer and the union. Neither the responding party or the applicant were able or willing to resolve this situation in order to assist Mr. Ridley. Ridley, a conscientious employee, was put in a very difficult position through no fault of his own. He gave his evidence in a forthright manner under very difficult circumstances.

8. On June 9, 1993 Keith Ridley received a letter from A. Jensen stating:

Dear Keith:

This is to confirm our phone conversation on June 9, 1993, as to Otis’ request that you return to work at the North Toronto Office on June 10, 1993 as a mechanic.

I informed you that you qualify to work as a mechanic under the agreement that if you did not return to work, Otis would consider that you have resigned from your job. You were also informed that Northern Elevator has (4) men in the same circumstance as you, working as mechanics and that the union was aware of it.

Yours truly,

OTIS CANADA, INC.

“A. Jensen”

A. Jensen
Maintenance Sup.

9. Counsel for the responding party submits there are two distinct allegations. One, the company violated sections 3, 65, 67 and 71 of the *Labour Relations Act* by deeming Ridley to have resigned when he did not accept work as a mechanic. Second is the grievance under the collective agreement dealing with Ridley’s assignment to mechanic’s duties and alleging the violation of the collective agreement and his deemed resignation is a termination without just cause. Counsel

asserts the unfair labour practice does not merit the Board's attention based on the allegations and the evidence.

10. It is clear that the employer and the union disagree about when an improver helper becomes a mechanic under the agreement. Counsel for the responding party submits the transition from improver helper is governed solely by the collective agreement and that the language is not ambiguous. Article 10.07 of the collective agreement refers to the completion of two items, 48 months in the industry and the mechanic's exam. Those are the only requirements in the agreement to become a mechanic under the agreement. There is no reference to "card mechanic" in the collective agreement.

11. Counsel referred to Articles 10.04, 10.05, 10.06, 10.07 and 10.08. There is no reference to any local area committee. There is no dispute that Ridley satisfied the requirement of 10.07 and pursuant to Article 2.03 the employer has the right to assign mechanics work to Ridley. Counsel submits the language in the agreement is clear and unambiguous.

12. Counsel for the responding party reviewed Schedule A of the the complaint/grievance and asserts there is no evidence before the Board with respect to a number of the allegations set out in paragraphs 4, 5, 6, 7 and 12.

13. It is the responding party's position that it did not interfere with the administration of the union and the representation of the employees by the union nor was there any coercion. The employer did not stop Ridley from going and talking to his union. There was and continues to be a real difference between the bargaining agents and between the company and the local in terms of the union attempting to hold on to its control using the term "card mechanic". Counsel submits that Mr. Baxter acknowledged the employers and the bargaining agent have not accepted the continued existence of the category of "card mechanic".

14. Counsel referred to the requirements of establishing an unfair labour practice as set out in *Beckett* (unreported decision dated June 25, 1986 Board File Nos. 0393-84-U and 2603-84-U) Counsel reviewed the evidence surrounding the incident with respect to Ridley's deemed quit. There was no evidence from Local 50 as to what advise they gave Ridley. Counsel submits Ridley could have worked and grieved later.

15. The responding company asks the grievance and the section 91 be dismissed.

16. Counsel for the applicant submits the issue before the Board is a case of how you become a mechanic once you are in the system. Counsel reviewed the evidence, exhibits and the relevant articles in the collective agreement and in particular Article 10. Counsel pointed out that there is no provision to reclassify to mechanic as it is for helper 1, helper II and improver helper. In order for the responding party to move Ridley to mechanic would require wording in Article 10.07 to the effect that upon successfully completing the various steps as set out a improver helper will be reclassified as a mechanic. However the agreement says "... an improver helper shall write the mechanics exam as set out by the CEIEP trustees." Counsel goes on to say that even if it is argued that it is implicit if you write the exam you get the next step there are documents that contradict that. One cannot ignore the history of the industry or Exhibit 15, the Manual of Standard Operating Procedures (SOP) of the Canadian Elevator Industry Educational Program (C.E.I.E.P.).

17. Counsel submits the examination is one of the factors considered when elevating successful candidates to "mechanic" in addition to the needs of the industry and the number of unemployed mechanics in the hiring hall.

18. Counsel contends there was manipulation by the employer which demonstrated a total lack of good faith. What should have happened is that Mr. Jensen and Mr. McCann should have agreed to disagree and find a way to deal with Ridley. While one might be critical in some ways of the union it is a two way street. It was the employer who made the decision to proceed the way it chose and this decision impacted on Ridley.

19. Counsel for the applicant submits the primary issue in this case is whether or not the company could reclassify Keith Ridley and make him a mechanic before any of the others who had written and had passed the exam had been reclassified. It is the applicant's position that the evidence of manipulation and misrepresentation of the facts by the employer demonstrates Otis had no real belief in their case. The applicant asserts that the employer's position and its suggestion to Ridley that he could be hidden on small one-man jobs where the union would not be told of the circumstances of the assignment was an attempt to interfere with the representation of employees by the union. Counsel further submits the work now, grieve later cases referred to by the responding party are not relevant as this employer denies it has disciplined Ridley and that in their view Ridley quit.

20. Counsel for the applicant states the Anderson Award dealt with rejecting a card or permit system for entry into the workforce and not a system which dealt with the manner in which one will become a mechanic once in the industry. The Anderson Award did not interfere with the process under which one becomes a mechanic.

Decision

21. The evidence suggests the timing as to when a successful improver helper can work as a mechanic did not become an issue until recently when there was unemployment among the mechanics.

22. The employer attempted to get Ridley to work as a mechanic in a less than forthright manner. It is unfortunate that the union and the employer were unable to find a solution to this dispute. The surreptitious approach used to put Ridley in the middle of an issue which the parties ought to have sorted out themselves does not contribute to good labour relations. The letter from Jensen to Ridley suggesting that "4 men in the same circumstance as you are working as mechanics at Northern Elevator" was based on unreliable information and no direct evidence was led that this had actually occurred.

23. Article 2.03(a) gives the employer the right to select personnel, hire, assign work or duties, transfer, layoff and recall employees; Article 10 sets out the progression from probationary helper I through to improver helper. Article 10.07 sets out the conditions for writing the mechanic's examination.

24. The agreement provides for joint committees to ensure a supply of qualified persons to the industry. Article 10.08 provides for a joint committee to develop and update the mechanic examination. There are provisions for temporary mechanics and the layoff provisions allow for a mechanic to work as an improver helper or take a layoff due to lack of work.

25. Trades in the construction industry are covered by the *Apprenticeship and Tradesmen Qualification Act of Ontario* for each trade. The exception are the elevator mechanics. The parties have made their own agreement with respect to the apprenticeship program to supply the industry with qualified elevator mechanics. The thrust of Article 10 is one of co-operation for the benefit of the industry as a whole.

26. Article 10.13 requires a referral slip from the union before commencing work. In the context of the hiring hall provisions in the construction industry and specifically Article 10.13 of the Elevator's Agreement Ridley was required to have a referral before commencing work as a "Mechanic". Whether using the term "Mechanic" or "Card Mechanic" does not affect the requirement of a referral from the hiring hall.

27. The issue before us is not when an improver helper is eligible to become a mechanic but whether the employer can promote or reclassify an improver helper to a mechanic's position (once the improver helper has complied with all the necessary requirements) without first requesting a mechanic from the hiring hall and obtaining a referral from the union. If there are qualified unemployed mechanics on the out of work list they would be referred out before any improver helpers who have become eligible to be reclassified as mechanics. If the employer requires a mechanic, pursuant to Article 10:13, the employer must "use the Local Union as a first source of job applicants". Article 2:03 does not include the right to reclassify or promote.

28. Having regard to all of the evidence, submissions and cases cited we find that the employer has violated the hiring hall provisions of the collective agreement. The employer's request that Ridley work as a mechanic without a referral from his union is a violation of the collective agreement. As a result Ridley did not resign from his job and was terminated without just cause. The Board will remain seized of this matter in the event the parties are unable to agree on the issue of redress and damages with respect to Mr. Ridley.

29. With respect to the application under section 91 of the Act we do not find a violation and this matter is dismissed.

DECISION OF BOARD MEMBER G. O. SHAMANSKI; April 29, 1994

1. I dissent.

2. On the basis of the evidence before this panel, I am not at all convinced the company has contravened the collective labour agreement or the *Labour Relations Act*. I would therefore dismiss the grievance.

3482-93-R; 3483-93-R United Food and Commercial Workers International Union, Local 175, Applicant v. San-Wal Janitorial Ltd., Responding Party

Bargaining Unit - Certification - Union making separate certification applications in respect of cleaning contractor's employees employed at separate locations - Union proposing site specific bargaining unit - Employer seeking single unit including employees in Metropolitan Toronto and in Region of Peel or, alternatively, separate municipal units - Board finding union's proposed site specific units appropriate

APPEARANCES: *Caroline Cohen* and *John Fuller* for the applicant; *Michael D. Failes* and *Joe Amorim* for the responding party.

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *W. N. Fraser* and *H. Peacock*.

DECISION OF M. A. NAIRN, VICE-CHAIR AND BOARD MEMBER H. PEACOCK; April 13, 1994

1. The style of cause is hereby amended to reflect the correct name of the responding party: "San-Wal Janitorial Ltd."

2. Board File No. 3482-93-R is an application for certification brought by the applicant (the "trade union") on behalf of a group of employees of the responding party (the "employer" or "San-Wal") working at George S. Henry Academy in North York in the Municipality of Metropolitan Toronto. Board File No. 3483-93-R is an application for certification in respect of employees working at Clarkson Secondary School in the Region of Peel.

3. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

4. These applications came on for hearing in respect of two issues. The first issue concerned certain allegations that the union had engaged in improper conduct in the collection of the membership evidence filed in support of these applications. Evidence was heard by the Board, following which the allegations against the applicant were withdrawn and need not be considered further.

5. That left one issue to be determined. The parties are in dispute with respect to the appropriate geographic reference to be contained in the bargaining unit description. It is the position of the applicant that a "site specific" bargaining unit is an appropriate geographic reference in the circumstances. The position of the responding party was twofold. Its first position was that the bargaining unit should be described so as to include the Municipality of Metropolitan Toronto and Region of Peel, in that employees of the responding party are situated throughout those areas. It was the alternative position of the responding party that there be two bargaining units described; one referable to the Region of Peel and the second referable to the Municipality of Metropolitan Toronto. The responding party opposed describing the bargaining unit on a site specific basis.

6. Following discussions by the parties they were able to provide the Board with a written Statement of Fact. In addition certain *viva voce* evidence was called.

7. That agreed Statement of Fact is set out below and we have included matters clarified by the panel during the hearing. We note that the employees concerned perform cleaning services.

1. Board file 3482-93-R relates to a school known as George S. Henry Academy and is in the school board of North York. San Wal provides cleaning services to 15 schools in that Board.
2. Board file 3483-93-R relates to a school known as Clarkson Secondary school and is in the school board of Peel Region. San Wal provides cleaning services to 22 schools in that Board.
3. San Wal has approx. 180 employees engaged in work at these 37 schools. Most schools have about 4 cleaners in total including a lead hand. There are approximately 70 to 80 employees employed in the Peel Board, and approximately 100 to 110 employees working in the North York Board.
4. San Wal has two area supervisors in each board area who visit the various schools during the normal work shift. The normal work shift is 8 hours - 4 p.m. to 12 midnight.
5. Both schools boards have collective agreements with CUPE that encompass Board

employees in the classification of caretakers, part-time cleaners & matrons (North York); and custodial staff and maintenance staff (Peel). It is not known how many of the schools serviced by San Wal have cleaning staff employed by the Boards performing similar cleaning functions during the school day. However, none of the schools have Board staff performing these functions after normal school hours.

6. San Wal employees perform essentially the same type of work at each of the schools.
7. The Clarkson contract has been held by San Wal for approx. 16 consecutive months.
8. The Henry Academy Contract has been held by San Wal for twelve years. In 1988 there was a 2 month hiatus to that contract.
9. There is a core group of employees in each school applied for comprising 4 cleaners which is basically constant for 11 months of each year.
10. There is coverage for absences of the core group (sick, vacation, WCB, absent days). This coverage is performed by other employees of the Company who may be from another school or may be "floaters".
11. At Henry Academy (North York) the service at that school is as follows:
 - 1 Carlos Rodrigues - 12 years - 12 years at location
 - 2) Maria Rodrigues - 7 years - 7 years at location
 - 3) Maria Vale - 6 years - 6 years at location
 - 4) Almerinda Salvia - 3 years - 8 months at location.
12. At Clarkson (Peel) the service at that schools is as follows.
 - 1) J. Barbosa - 1 year - 1 year at location
 - 2) F. Teixeira - 1½ years - 4 months at location
 - 3) M. Vireo - 1 year - 1 year at location
 - 4) R. Marquis - 4 months - 4 months at location.
13. At most schools (with the exception of schools that have summer classes) there is some movement in July and August between schools to facilitate heavy summer cleaning. On completion core groups return to their home location.
14. At Clarkson in the 30 day period prior to the Union application there was no interchange or relief of any sort. In the seven week period prior to the application there was 1 day of relief.
15. Similarly, at Henry Academy the corresponding numbers were 2 people within the 30 day period prior to the application and in the 7 week period prior to the application those same two people each worked 1 day.
16. The company classifies employees as lead hand, assistant lead hand, heavy cleaners or light cleaners. The lead hand or assistant lead hands also serve as heavy cleaners. Eighty to ninety percent of the heavy cleaners are male. All but one of the light cleaners are female. There are approximately 70 heavy cleaner employees and 120 light cleaners employed.
17. The company previously cleaned Clarkson, lost the tender, and did not tender for approx 4 years from 1988 to 1992.

18. Most employees (approx) 90 percent attend the company offices and are transported to their workplace by vehicles (i.e. company vehicle or lead hand vehicle), others are picked up along the way. A small number report directly to the school.
19. There is on any given day 5 or 6 absences that require vacancies to be filled by persons mentioned earlier.

8. The *viva voce* evidence provided certain additional information. The company has a head office and warehouse facility in the City of Toronto. Equipment and supplies are also dispatched out of that location and as indicated, employees generally arrive at that location in order to be transported to their work location. At the end of the shift the driver does not return employees to the head office but drives employees to their homes. As a consequence the employer tries to keep employees in an area which is convenient in that respect.

9. All employees, subject to their classification, receive the same terms and conditions of employment and the employer has one payroll. One supervisor is responsible for the Peel Board; the other for the North York Board. The two supervisors deal with staffing assignments on a daily basis from the head office. They also attend at the schools on a rotating basis during shifts to ensure that work is being performed appropriately. To date the supervisors have had a fair degree of flexibility available for their decisions with respect to the movement of employees. The employer agrees however that it is beneficial to both the employees and the employer to maintain employees in "home" schools. The supervisors are also generally responsible for training, although that training is not extensive.

10. During the year there are special cleaning projects. The largest of these is the summer clean-up. It occurs in all the schools although the scheduling of the clean-up may vary depending on whether or not a summer school program operates in that location. Similar, although not as extensive clean-ups occur over the Christmas break and during the March spring break. During these periods there is some reassignment of staff to accommodate the heavier cleaning schedule. In those schools where summer school classes operate, the School Board itself provides the cleaning services during the time that the summer school is in operation. The employer's crew from that school would be moved during that period to another school to assist with the summer clean-up there. Once completed, they would return to conduct the summer clean-up at their home location.

11. The employer obtains the contract for providing cleaning services through a tender and bid process. The School Board tenders the work at each school individually. The employer can bid for any, all, or a combination of schools. Similarly, the bid may be awarded on the basis of any, all, or a combination of the schools that had a bid entered. The employer can choose not to bid on a particular school as it wishes. The Peel contract is presently a two year contract. The North York contract is a five year contract with annual negotiations on cost.

12. The employer attempts to accommodate employees seeking to change their home location. Promotions to lead hand positions can occur between schools, although no formal selection process exists. Under the contract the School Boards have a right to require the dismissal of an individual. That right has only been exercised once in Peel Region and rather than be dismissed, the person was moved to a school in North York.

13. While it has held other contracts in the past, for the last few years the work of this company has been comprised of the cleaning services provided to these two School Boards. If work is lost, the employer has attempted to absorb the employees (not always successfully) into other locations rather than to be subject to lay-off. The individuals represented by CUPE are direct employees of the School Boards and generally perform the janitorial and cleaning work during the day.

14. In opposing the union's position on the bargaining unit description, the employer argues that it has an integrated workforce and that a site specific bargaining unit description would work to the disadvantage of both the employer and the employees. The employer asserts that there would be greater costs associated with a multiplicity of bargaining units. In addition employees would be subject to reduced mobility with potential negative consequences. The employer acknowledged that granting a multi-municipality bargaining unit would be exceptional. We agree. The employer really focused its comments on its position that two bargaining units ought to be described by reference to the Region of Peel and the Municipality of Metropolitan Toronto. The employer argued that there was a conflict with existing bargaining structures to the extent that the School Boards play a role and that their janitorial staff are represented on a School Board-wide basis. In support of its position that this is an integrated workforce, the employer relies on the operation of the head office, the single administration, the arrival of employees to that central location for transportation to their work site, and the interchange of employees between schools during the special cleaning projects and in order to cover daily absences. The employer points to the fact that employees are absorbed into the workforce in the face of losing a school.

15. The employer distinguishes itself from what it asserts was intended to be covered by the amendments in section 64.2 of the Act. The employer asserts that section 64.2 addresses specifically single site operations. Prior to the enactment of Bill 40, the employer argued, typically it was to an employer's advantage to obtain site specific bargaining units because if the contract was lost the employer was able to let the employees go. However that does not apply, it argues, in the context of an integrated operation such as this, particularly where the work flows from only two contracts each of which contain a number of sites.

16. In response, the union argues that it is only required to persuade the Board that its description is an appropriate bargaining unit, and that the bargaining unit be viable without causing serious labour relations problems. The union suggested that the only flaw they could anticipate with site specific bargaining units, and in the face of section 64.2 (which would continue the bargaining rights at a specific school location), would arise in a circumstance where the employer did not tender for the work at a school and no other contractor took that work over. In the event that the work was then performed by employees of the School Board the union suggested that a jurisdictional dispute might arise between CUPE and the applicant in respect of whose bargaining rights prevailed. (We note that what would arise is a potential successorship, not a jurisdictional dispute, although there may be issues arising from then competing bargaining rights). The union relies on the obstacles to organizing on a broader basis and argues that unless there is some serious reason the wishes of the employees should be respected. In this case that would entitle both these applications to succeed based on the documentary membership evidence filed. In reply the employer asserts that there are no unusual obstacles to organizing on a broader basis in that the employees all meet at a central location and go to unsupervised work sites.

17. The Board has recently again commented on its approach to the question of bargaining unit configurations. In *The Governing Council of the Salvation Army in Canada and Bermuda*, decision of the Board dated January 5, 1994, as yet unreported [now reported at [1994] OLRB Rep. Jan. 85], the Board comments at paragraph 18:

18. Several years ago, in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board undertook a review of its traditional approach to bargaining unit determination...

(The Board quotes from that decision at length and continues)

19. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the Statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal

of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.

20. These goals must be harmonized within a framework that now recognizes that there is no single unique and indisputably “appropriate” unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in *Hospital for Sick Children* put it) “serious labour relations problems”. A trade union need not seek to represent the *most* comprehensive or *most appropriate* bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for.

18. That decision then discusses the issue that is raised by this case, that is, concern over fragmentation. In that case, where the union was seeking to represent a more comprehensive unit, the Board had little difficulty in concluding that what the applicant sought was an appropriate bargaining unit. Here the union seeks a less broadly defined, site-specific unit.

19. We do not find the cases referred to by the employer involving manufacturing or paramedical employees to be of assistance. *Best Cleaners and Contractors Limited*, [1988] OLRB Rep. Nov. 1143, decided prior to the amendments and relied on by the responding party, can be compared with the decision in *Burns International Security Services Limited*, [1993] OLRB Rep. June 480, relied on by the applicant. In both cases the Board described a municipal-wide bargaining unit in circumstances where the employer operated out of only one location at the time of the certification application. Both decisions also recognize that site-specific bargaining units may be appropriate.

20. As the employer in this case argued, prior to the introduction of section 64.2, it was to an employer’s advantage to have site-specific bargaining units described for certain contracted work, in that if the employer lost the contract, it could let the employees go. In fact, it appears that to the extent there has been any serious labour relations problem demonstrated by site-specific bargaining units, it was the resulting impermanent nature of the bargaining rights. Enhancing security of both employment and bargaining rights seems the clear aim of section 64.2 which appears, in large measure, to address that identified problem.

21. Underlying our comments is the view that this employer operates a no more highly integrated workforce than many multi-contract providers of security or cleaning services, where site-specific bargaining units are by no means uncommon. While a more comprehensive bargaining unit is probably *more* appropriate, that does not necessarily make a site-specific bargaining unit *inappropriate*. The employer agreed that its workforce is basically stable. The agreed facts that reflect a considerable length of service by some employees at particular locations and the limited amount of interchange between locations confirms this. We note that although the contract is held with each School Board for a number of schools, the tender and bid process involved, in effect, reflects a variable number of site-specific agreements combined within that larger contract. While there may be bargaining issues that arise in this context, neither historically nor in this case is there evidence of the kind of serious labour relations problems that would lead us to conclude that the site-specific bargaining units applied for are not appropriate.

22. On balance, we are persuaded and find that the applicant’s proposed site specific bargaining units are appropriate. Although the geographic scope of the bargaining unit was the only issue raised before the panel, on a review of the Officer’s report and employee lists filed in each application, it is unclear to the panel whether or not “supervisors” were intended to be included in or excluded from the bargaining units. Having regard to our decision, the parties are directed to

contact a Labour Relations Officer forthwith in order that these applications may be finally dealt with.

DECISION OF BOARD MEMBER W. N. FRASER; April 13, 1994

1. I dissent.
 2. I disagree with the decision of the majority that site specific bargaining units are appropriate.
 3. I would have accepted the alternate position of the employer, and found that two separate bargaining units, one for the Region of Peel and one for the Municipality of Metropolitan Toronto are more appropriate.
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2061-93-M United Steelworkers of America, Applicant v. Shelter Canadian Properties Limited, Responding Party

Discharge - Discharge for Union Activity - Interim Relief - Remedies - Board reinstating discharged resident superintendents on interim basis pending disposition of unfair labour practice complaint - Board clarifying that interim reinstatement involving both previous benefits of employment (including residence) and obligations

BEFORE: *Judith McCormack*, Chair, and Board Members *G. O. Shamanski* and *H. Peacock*.

DECISION OF THE BOARD; April 25, 1994

1. This is an application under section 92.1 of the *Labour Relations Act* in which the applicant requests an order reinstating Alex Bijelic and John Kelly to their previous employment on an interim basis, pending the disposition of a complaint filed under section 91 of the Act.
2. This matter came on for hearing on September 29, 1993, and the Board issued the following decision on September 30:
 1. The Board hereby directs that Shelter Canadian Properties Limited forthwith reinstate John Kelly and Alex Bijelic on an interim basis, pending the disposition of the section 91 complaint in this matter. For the clarification of the parties, interim reinstatement involves both the previous benefits of employment and the obligations. The previous benefits of employment include residence, and the obligations of employees include a requirement to carry out their duties with civility and co-operation.
 2. The Board further directs Shelter Canadian Properties Limited to post the attached notice in appropriate places in the workplace where it is most likely to be seen by employees.
 3. The Board further directs that the section 91 complaint in this matter and the certification application be rescheduled to commence on October 6, and continuing on from day to day thereafter until their completion or as otherwise ordered by the Board.
 4. Our reasons will follow.

We now provide our reasons.

3. The responding party in this matter is a property management company which employs Messrs. Bijelic and Kelly as resident superintendents at a King Street property in Toronto. The applicant union asserts that an organizing campaign began on July 15th of this year with respect to the responding company's employees, and that these two resident superintendents were the principal inside organizers. The campaign culminated in the filing of an application for certification with the Board on September 15, 1993. The company acknowledges that it received a package of material from the Board on September 20, 1993, which included notice of the certification application. However, the company asserts that the package was forwarded to another office and remained unopened until September 21st. The employment of Messrs. Bijelic and Kelly was terminated on September 20, 1993. The union then filed a section 91 complaint alleging that these two individuals had been discharged contrary to the *Labour Relations Act*, and brought this application for interim relief.

4. Section 92.1 provides as follows:

92.1.-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

5. The Board's approach to this section is reflected in a number of cases in which it has been applied. The first is *Loeb Highland*, [1993] OLRB Rep. March 197 where the Board made these observations:

18. In other words, it is incumbent upon the Board to develop a sound and indigenous jurisprudence in regard to interim orders which reflects the complex and unique realities of labour relations. While we echo the views of the British Columbia Industrial Relations Council to the effect that common law principles may provide us with some useful insight, if we were to import in a wholesale or unreflective manner the kinds of tests applied by Courts in considering interim and interlocutory relief, we would be failing in our responsibility as an expert tribunal to develop a jurisprudence attuned to the distinctive features of labour relations in this province. This latter point, that our jurisprudence should reflect the realities of Ontario labour relations in particular, is also important. While we have found much that is instructive in the cases we have reviewed from other provinces, we also feel constrained to note a number of differences in the legislative or other authority which gives rise to their interim powers, in the purposes of their respective labour relations statutes and in the history and climate of their labour relations. Again, an uncritical adoption of any one of the various approaches in these cases would not serve the Ontario labour relations community well.

19. With this in mind, we turn first to the company's argument that the Board's interim relief power should be used only in rare and exceptional circumstances. We do not find this a particularly useful approach. Section 92.2(1) contains no hint that it should be reserved to extraordinary cases; indeed, unlike some corollary provisions which contain threshold tests, the Ontario provision is available in every proceeding before the Board. This is not to say that the prospect of a flood of interim relief applications does not cause us some concern. However, we think it more appropriate to start from the position of attempting to elucidate a fair and intelligent labour relations test for section 92.2(1). Those cases that meet that test should then attract interim relief, regardless of how many or how few they may be.

20. In considering the dimensions of such a test, we note that the cases from other provinces reveal an assortment of approaches and considerations in addressing interim order requests. However, there are a number of common themes running through them which may be summarized in the following manner. Most refer to some kind of threshold test in regard to the merits of the main application with reference to which interim relief is sought. Some require that a case not be frivolous or vexatious, a requirement which has also been described as the equivalent of whether there is a serious issue to be tried. Other cases have referred to whether there is an

arguable case of breach, or the possibility of a legitimate claim, and a number require that there be a *prima facie* case, or that there be a strong *prima facie* case. Secondly, most cases involve a review of the harm which might befall the applicant if the interim order is not granted, and whether that harm is irreparable. Finally, the cases refer to the balance of convenience between the parties.

21. Turning first to the idea of a threshold test with respect to the merits of the main application, we have some concern about applying a high level of scrutiny to that application at the time of a request for an interim order. To the extent that such scrutiny may imply a form of prejudgement of the final disposition of the main matter, it is not particularly compatible with the scheme for interim relief set out in the Act and the Board's Rules of Procedure. More specifically, the procedure for interim relief contemplated by the Board's Rules reflects the inherent necessity for expedition in these matters. To that end, evidence is filed by way of certified declarations which are not subject to cross-examination. Indeed, section 104(14) of the Act and Rules 92 and 93 indicate the Board may not hold an oral hearing at all, but may receive the parties' arguments in writing as well.

22. This means that the Board is not in a position to make determinations based on disputed facts. In these circumstances, it would normally be unfair for an interim order to be predicated to any significant extent on a decision with respect to the strength or weakness of the main case. That should await the hearing of the main application when the Board hears oral evidence and can make decisions with respect to credibility based on the usual indicia, in a context where the parties have a full right of cross-examination. This is particularly important in cases such as the section 91 complaint to which this application relates, where decisions are often based on inferences and the various nuances of credibility play a key role. In other words, the granting of interim relief in this context should usually be based on criteria which minimize prejudging the merits of the main application.

23. Our practical concern that the Board's decisions on interim relief be insulated to some extent from the merits of the main application is reinforced by the language of section 92.1(1), which provides that an interim order can be obtained in an intended proceeding as well as in one already filed. If an interim order is available even before the main proceeding has been commenced, it suggests that interim relief is less dependent upon the main application than one might otherwise think.

24. Moreover, a number of the provisions of the *Labour Relations Act*, including some of those which the applicant alleges were breached in the complaint in this matter, are subject to a reverse onus where a responding party must establish that it did not violate the Act. The effect is to complicate an assessment of the merits, including the issue of what would constitute a *prima facie* case in these circumstances. In addition, the interim order power contained in section 92.1 applies to an extensive package of legislative amendments, many of which involve new or reshaped jurisdiction for the Board. This means that it may be difficult to evaluate the strength of the merits of any particular case, at least until the Board has had an opportunity to develop case law in these new areas. Lastly, even where the Board can rely on well-established jurisprudence, there must be some allowance for novel arguments to be presented to it from time to time. While no tribunal encourages frivolous applications, it is also true that the Board must be responsive to changes in labour relations if its jurisprudence is to remain vital and relevant.

25. At the same time, it is clearly essential that there be some connection between interim relief and the merits of the main application. Common sense suggests that an interim order is inherently subordinate to the main application, a proposition which is given added cogency in this context by Rule 88. That rule makes it clear that a copy of the main application must be filed along with the request for an interim order, which to some extent offsets our view of the effect of section 92.1 in intended proceedings. Isolating the interim application by the absence of any requirement with respect to the strength of the main application might also carry with it the possibility of abuse, and might strand the Board in a situation where grounds for an interim order might be made out but the main application was entirely and obviously without any merit whatsoever.

26. With this in mind, we find it most appropriate to set out as one requirement in a test for

interim relief that the main application must reflect an arguable case. By this we mean that if the applicant's assertions can be established, there is at least an arguable breach of the Act, or an arguable case for a remedy within the parameters of some provision of the Act. While leaving room for some innovation by parties, such a test protects the integrity of the Board's processes by precluding interim relief where the main application is frivolous or vexatious. This provides the Board with an element of security and some coherence between the main application and the interim relief power, but gives recognition to our other concerns described above.

27. We also find it more appropriate to consider this requirement as simply one ingredient in a test for interim relief, rather than an initial threshold of some kind. Setting up an assessment of the merits as a preliminary hurdle in an interim relief test suggests a two-step analysis which we find unnecessarily formal in the circumstances.

28. Returning to the themes reflected in the interim order cases from other provincial boards, the next issue is the concept of irreparable harm. This formulation is not as useful to us as it might first appear. In the first place, a review of the cases suggest that it is a rather elastic concept, which is often interpreted differently from one case to another. Secondly, the experience of this Board is not that there are two distinct categories involving cases on the one hand where entirely adequate remedies can be applied, and those on the other where the available remedies are clearly deficient. Rather, it is a more accurate reflection of the Board's experience to say that most remedies cannot cure every aspect of the harm which may flow from a breach of the Act, and that at best, the Board attempts to provide some rough approximation. Labour relations matters often involve a cluster of intangible and fluid social relations which may be extraordinarily time-sensitive. Once these relations are ruptured, they are not easily restored through the sometimes clumsy operation of subsequent remedies. Indeed, it goes without saying that remedies are, by their very nature, a substitute for what should have happened.

29. At the same time, when creatively exercised, the Board's wide remedial powers under section 91, for example, can often go a considerable distance toward repairing the mischief caused by violations of the Act. Any consideration of interim relief should also take into account the Board's experience in developing remedial orders which speak specifically to labour relations problems. Moreover, we recognize that the imposition of relief before an adjudication on the merits is inherently problematic to some extent.

30. In this context, we find it more useful to acknowledge that in terms of our ability to address harm through remedies available at the disposition of the main application, what we are really dealing with is degrees of adequacy on a continuum of damage. Attempting to force this reality into mutually exclusive legal pigeon holes such as irreparable damage as opposed to, say, repairable damage, is more artificial than we need to be, and does not reflect the Board's practical experience.

31. If the concept of irreparable harm does not shed as much light as we would like on the test for an interim order, there is no doubt that some analysis of harm is still central. In considering the shape of that analysis, it is useful to return to the Board's own jurisprudence which emphasizes the importance of effective remedies as a critical component of the scheme of the *Labour Relations Act*. As the Board said in *Radio Shack*, [1979] OLRB Rep. Dec. 1220:

It is trite to say that all rights acquire substance only insofar as they are backed by effective remedies. Labour law presents no exception to this proposition. An administrative tribunal with a substantial volume of litigation before it faces a great temptation to develop "boiler plate" remedies which are easy to apply and administer in all cases. This temptation must be resisted if effective remedies are to buttress important statutory rights. An important strength of administrative tribunals is their sensitivity to the real forces at play beneath the legal issues brought before them and there is no greater challenge to the application of this expertise than in the area of developing remedies. To be effective, remedies should be equitable; they should take account of the economics and psychology permeating the situation at issue; and they should attempt to take into account the reasons for the statutory violation.

32. Moreover, both the Board and the Courts have long recognized that delay poses special

problems in labour relations matters. In *Consolidated-Bathurst Packaging Ltd. v. I.W.C., Local 2-69* (1984) 2 O.A.C. 277, the Court noted:

... there is a fundamental principle of labour law that injustice and detriment to the labour relations of an employer and employee will result if the process is delayed. In my opinion, it is fair to say that the thrust of jurisprudence not only in the Board but in the courts may be summarized by saying:

In the law which has grown up around labour relations in this province and indeed elsewhere where the common law is pursued, the overriding principal invariably applied is that labour relations delayed are labour relations defeated and denied: *The Journal Publishing Company of Ottawa Ltd. v. The Ottawa Newspaper Guild*, Ont. C.A. released May 17/77 (unreported) [since reported [1977] 1 A.C.W.S. 817 (Ont. C.A.)].

Similarly, in *Re United Headwear and Biltmore/Stetson (Canada) Inc.* (1983), 41 O.R. (2d) 287, the Court commented that delay in labour relations matters often works unfairness and hardship. To some extent then, the Board must ensure that delay does not in itself decide a case.

33. The importance of effective remedies, their general imperfection in labour relations, and the corrosive effects of delay all serve to highlight the critical role interim relief has to play in this area. If harm is not easily cured after the fact, and if delay is critical, it makes some sense to emphasize preventing that harm at the earliest possible point. However, it must be recognized that preventing one harm, to a union applicant for example, may well have a harmful labour relations effect on a responding employer. This suggests that a general predisposition towards preventing harm, rather than curing it, applies to the interests of both parties. In other words, the Board must balance the harm to each party in considering whether to grant an interim order. As a result, rather than separating out the concept of irreparable harm which appears to be a poor fit with the Board's experience in remedial matters, and then proceeding to an examination of the balance of convenience, we find it more consonant with labour relations realities to adopt an approach where we consider both what harm may occur if an interim order is not granted, and what harm may occur if it is. This does not mean that the notion of irreparable harm is entirely irrelevant. It merely reduces it to one of a number of aspects of harm which the Board might consider in this area.

34. Of course, this leaves open to some extent the sort of harm we envision as relevant to this balancing process. Given the fact that this jurisprudence is in its infancy, it makes sense to allow the parameters of that harm to evolve in the context of concrete situations which will be presented to us. Suffice it to say at this point that balancing the harm to the parties is not an exercise which takes place in a vacuum, but rather in the context of the purposes and scheme of the Act, which also serve to provide definition for the type of harm we would find persuasive. It is also worth noting that the Board has more flexibility in crafting interim orders than it may in final remedies. Because they are temporary, and because they are not dependent on a finding of a violation, for example, the Board has the relative luxury to conceive of interim justice as an endeavour in problem-solving, rather than fault-finding.

6. In *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. March 242 the Board made these comments:

8. In deciding the issue of interim relief, however, it is necessary for this panel to have some regard for the potential merits of the complaint. Interim relief is important to this applicant precisely because it serves to preserve rights pending the hearing of its complaint. It would be a distortion of the process if the Board granted such relief no matter how frivolous the complaint itself. The applicant urges the panel to find that it has established, at the least, a *prima facie* case. Counsel for the company suggests that the Board should look to see whether the applicant can show it is *likely* to succeed on merits of the complaint.

9. In our view, the complaint makes out an arguable case. We need not determine to what extent the complaint makes out a *strong* case, viewing it in its most favourable light. Simply put, it is plausible that a panel hearing it may find that the Act has been violated, and order a rem-

edy. We note that there have been occasions where the Board has found letters from an employer to employees in the context of an organizing drive to constitute violations of the Act.

10. In this context, the goal of this panel's ruling is the preservation of the right of the union to a meaningful remedy, should the complaint be upheld, while at the same time intruding as little as possible on the employer's interests.

11. Both counsel have submitted that the Board ought to look at the harm that would ensue to each of the parties' interests, should the Board grant or not grant interim relief (although they have used different terms, such as the "balance of convenience", or "significant harm" to describe the notion). We agree that the relative harm of granting or withholding relief is a relevant consideration. In our view, the harm to the union in this case relates to the adequacy of relief in the complaint. The allegations are that the letter, and the manner of its distribution, unduly influences employees in the exercise of their choice to join or not to join a union. If these allegations are proven, it will be difficult for the Board to order a remedy which truly places the union back in the position in which it would have found itself, but for the breach of the Act. By the time the complaint is adjudicated, there will be no returning to the point in the organizing drive prior to the actions of the company, particularly if they continue.

7. The Board took a similar approach in *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. April 358:

14. While the approach and experience of the courts in dealing with temporary injunctions may be useful, at least by analogy, for the purposes of articulating the kind of inquiry the Board performs in adjudicating applications for interim orders, we are of the view that it would be inappropriate to rigidly adopt that approach and mechanically apply it to the unique kinds of labour relations problems with which this Board must deal. Thus, for example, we find the employer's reliance on the distinction between mandatory and prohibitory injunctions (and the stricter standards which may be applied in the former cases) to be of little value in the labour relations context. Labour relations involve a fluid and ever shifting landscape and any attempt to characterize the particular relief being sought as the equivalent of a mandatory rather than a prohibitive injunction may be subject to fortuitous circumstances capable of significant change from one day to the next. Should the Board adopt a different standard depending on whether a union seeks to restrain an employer from implementing the announced lay off of a union organizer or, alternatively, seeks, say a day later, to have the laid off organizer returned to work? More telling, perhaps, is the fundamental difference between the nature of relief commonly available and granted in the courts as opposed to the typical remedial response that the labour relations community has come to expect from the Board (or even from labour arbitrators). While relief like temporary mandatory injunctions or specific performance is indeed rare in the courts, the labour relations equivalent remedy of reinstatement to employment is part of the daily diet of this Board. We are consequently of the view that extreme caution ought to be exercised in respect of any attempt to transplant approaches or jurisprudence from the courts to this Board.

15. Having sounded this warning, however, it is also clear that portions of the established court approach may be appropriately adapted to fit the labour relations context. The parties did not seriously dispute that an applicant for an interim order could well expect the Board to perform some assessment of the apparent merits of the main application. Indeed, the cases relied upon, whether decisions of the courts or of specialized labour relations tribunals, all indicate this. They differ, however, as to the nature of the standard to be applied, positing standards which range from insuring that the claim is not frivolous or vexatious to requiring a strong prima facie case. Before this Board determines where on this continuum it should locate this aspect of any test for granting interim orders, it is useful to consider the purpose and nature of these types of proceedings. We cannot lose sight of the fact that interim relief is *interim* - it is not a remedial response to any violation of the Act. There will be no remedial or other response unless and until the Board makes a finding in the main application that the Act has been violated or that other circumstances warranting a remedial or other response have been established. In this respect interim orders under section 92.1 are readily distinguishable from what is commonly referred to as "interim certification" under section 6(2) of the Act. In the latter case the Board must be satisfied as to the applicant's ultimate success in its certification application. Apart from determining what the Board "considers appropriate", there are no equivalent legislative precon-

ditions to the exercise of the Board's discretionary power to make interim orders under section 92.1. An interim order represents, in part, an evaluation by the Board, in the face of a conflict and in response to a request by one of the parties, as to the preferred labour relations circumstances to be preserved or created during the course of the litigation of the main application. This evaluation must be capable of expeditious application and be responsive to developments which may be dramatic. To the extent that the amount of time between events giving rise to requests for interim orders and the Board's disposition of those requests can be minimized so too will any undesirable disruptive effects of Board intervention be lessened. The Board's power to grant interim orders will serve to minimize the negative effects or potential serious harm that may result from the passage of time associated with the litigation of the main application.

16. In this context it is hardly surprising that there are significant differences in the conduct of these types of proceedings. The most obvious difference is that oral hearings need not be held in these cases. Further, given the premium attached to expedition, even in cases where a hearing is held the Board is unlikely to entertain viva voce evidence. And while the parties are required to file declarations detailing all of the facts relied upon and signed by persons with first-hand knowledge, the rules contemplate no opportunity for cross-examination of the declarants. These procedures are consistent with the need for expedition and the fact that no final determinations are made in these types of proceedings. In this context the Board is obviously unlikely to arrive at any firm conclusions regarding the merits of the main application - at best it can only draw some conclusion about the apparent nature of that application. Thus, it appears to us that the most appropriate fashion for the Board to evaluate the apparent merits of the main application should resemble that in which the Board makes determinations under (both the former section 71(1) and the current) Rule 24 of the Board's Rules of Procedure which reads, in part:

Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing...

In other words, unless the Board is satisfied that, assuming the truth of all the facts relied upon by the applicant, an arguable case for the orders or remedies sought in the main application is made out, the applicant's request for an interim order will not be granted. To the extent that an applicant's apparent case in the main application may be capable of meeting a more rigorous standard, that may be a factor which the Board will possibly consider in determining whether or not to grant the interim order sought.

In *Metropolitan Toronto Apartment Builders Association*, [1993] OLRB Rep. Mar. 219, the Board indicated that it would also look to the effect of the bargaining relationship between the parties, and that a Board order staying the effect of a collective agreement provision would in the circumstances of that case, be a serious intrusion into that relationship. As a result, the application was dismissed.

8. In *Price Club Canada Inc.*, [1993] OLRB Rep. July 635 the Board analyzed the case in these terms:

9. Thus, assuming that all of the facts relied upon by the applicant are true, the Board is satisfied that an arguable case has been made out for a number of the orders sought in the proceedings to which this application relates, including Mr. Darnell's reinstatement. We turn then to the more difficult matter of weighing the labour relations harm which could result from granting or not granting the interim reinstatement of Mr. Darnell sought by the application in the instant case.

9. The Board then added these comments in *Blue Line Taxi Company Limited*, [1993] OLRB Rep. Aug. 793:

18. The parties are correct when they state that the Board, in determining whether any interim orders are appropriate, has articulated that it will balance what harm may occur if an interim order is not granted, against what harm may occur if it is granted and will consider whether the applicant has made out an arguable case for the remedy requested in the main application.

These two factors are not the only factors that the Board may consider, they are merely some of the ingredients in the test for interim relief (see *Morrison's Meat Packers Ltd.*, [1993] OLRB Rep. March 226, where the Board considered a lack of expedition in the filing of an application for interim relief).

* * *

21. We agree with the Board's reasoning in *Loeb Highland*, *supra*, that it is appropriate to apply a test which balances the harm which may occur if an order is granted against the harm which may occur if the order is not granted. The Board in assessing harm looks primarily at the harm which may be suffered by the parties to the action. Counsel for the applicants states that their position will be greatly prejudiced due to the irrevocable nature of many of the transactions associated with the assignment of the spots. Examples of the transactions referred to include the making of financial arrangements, the purchasing and licensing of a new vehicle and obtaining provincial grants in respect to the vehicle purchases. We have difficulty with counsel's assertion. First of all, it was not indicated to us why the applicants feel that these transactions are irrevocable and we do not agree that they are. As a result of success in the lottery held by the union, three individuals purchased the right to utilize a taxi stand spot. It was not disputed that this right can be bought and sold. There does not appear to be anything irrevocable about the transactions referred to, which are associated with the acquisition of a spot. Secondly, it appears to us that it is not the applicants who could suffer harm if the Board finds a violation of the Act in the main application and orders the union to reverse the allocation of the spaces, but the individuals who currently believe that they own the spots and are proceeding to acquire and license the necessary vehicle on that assumption. Therefore, the applicants are relying solely on harm which could befall individuals who are not a party to this action as justification for the ordering of interim relief. They have not suggested that an interim order is necessary in this case to prevent harm to themselves. In an application for interim relief the Board assesses the potential or actual harm that will be suffered, primarily by the parties to the application. While harm to third parties or the general public may be relevant, it will not by itself generally be sufficient to warrant the granting of an interim order. Finally, we would observe that the potential harm to the individuals who purchased the spots in good faith will be largely financial in nature and can be the subject of a remedy in the main proceeding if appropriate. The Board will not generally order interim relief to avoid or limit harm which is purely financial in nature (see *Morrison's Meat Packers Ltd.*, *supra*, and *Price Club Canada Inc.*, Board File No. 1467-92-U, dated November 5, 1992, as yet unreported). If the potential harm is primarily economic loss, this harm can be the subject of a monetary award in the main action.

10. Summarizing its approach in *East Side Mario's*, [1993] OLRB Rep. Aug. 744, the Board said as follows:

7. The Board was referred to a number of its recent decisions dealing with the power to grant interim orders under section 92.1 of the Act (see *Loeb Highland*, cited above (and the concurring opinion of Board Member Ronson reported at [1993] OLRB Rep. Apr. 354); *Reynolds-Lemmerz Industries*, [1993] OLRB Rep. Mar. 242; and *Morrison Meat Packers Limited*, [1993] OLRB Rep. Apr. 358). These cases make it clear that the Board will perform two key assessments in determining whether or not to grant an interim order. First, the Board will make an assessment of the apparent merits of an applicant's case in the main application. This assessment, however, of necessity must be made within certain limited parameters and will rarely, if ever, include any determination as to whether or not the Act has been violated (a determination which will be reserved for the panel dealing with and hearing all of the evidence in the relevant main application).

* * *

9. It is clear that this assessment of the apparent merits of the main application is made on the basis of the *applicant's* materials and assuming that all of the facts alleged by the applicant are both true and provable. There is no doubt in our mind that, on this basis, the applicant has established an arguable case for the remedies sought in the main application. Indeed, we are satisfied that we would arrive at the same conclusion even if we were to ignore the applicant's materials insofar as they allege actual knowledge by the employer of the grievors' union activi-

ties prior to the discharges (allegations which are explicitly denied in the company's materials). It is difficult to imagine circumstances in which the discharge of key inside union organizers during the early stages of an organizing campaign would not give rise to an arguable violation of the Act. This is not to suggest that every such complaint, or, indeed, the instant one, will succeed on the merits. That, however, is not the determination to be made in the context of an application for an interim order. We are satisfied that the union's application makes out an arguable case for the remedies sought in the main application.

10. The second assessment the Board performs involves a relative evaluation of the harm which may result from granting or not granting the interim order being sought.

11. The reasons for the Board's decision in *Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019, were issued after the hearing in this matter, and as a result, we have not relied upon them in coming to our decision. However, we find the following excerpts a convenient way of expressing our views with respect to this case:

37. Nevertheless, we think it is fair to conclude that section 92.1 was intended to be an *addition* to the Board's remedial arsenal. It was intended to supplement the Board's existing labour relations "remedies" available at the end of a case, so that what the Board must now do, is square its new powers with the established legal framework. Moreover, interim relief is clearly derivative. It does not stand alone. It draws its essence, and must be tailored, to the particular mix of facts in each case, as well as the public and private interests at play in the main application. The main application sets the framework for consideration of the particular facts under review, and the particular interim "order" or "relief" requested.

38. Since that is the starting point for any interpretation of section 92.1, it may be useful for this case to briefly consider the way in which the Board approaches the litigation and resolution unfair labour practice complaints filed in connection with an organizing campaign.

39. In the first place, we might observe that the Board is not a court; and there is no reason to expect that either its adjudicative or remedial approach should mirror that of a court. Civil practice may sometimes provide a useful analogy, but when the Act so clearly involves policy considerations, so systematically modifies common-law premises, and so clearly excludes judicial involvement (see section 110), it would be curious for the Board to make common-law criteria a governing principle of interpretation. This is not to say that the Board's approach to dispute resolution will never resemble that of the courts; however, the criteria applied, and the result reached, are more likely to be based upon the scheme and purpose of the Act, the Board's own experience, and the norms and needs of the industrial relations community. (See generally: *Alex Tomko v. Labour Relations Board of Nova Scotia, et al* (1975) 76 CLLC ¶14005 (per Laskin, C.J.C.).)

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41. In our opinion, these "remedial" considerations traditionally reviewed at the end of the case should inform the way in which the Board approaches interim orders or "relief". In both instances, the *Board* is required to blend and balance statutory imperatives, policy considerations, and the realities of contemporary labour relations.

42. Where interim relief is sought in connection with an unfair labour practice complaint, one must keep in mind the legal rights and administrative processes that the law is intended to protect; or to put the matter another way, the rights and processes which the impugned conduct may (and may be intended to) undermine. In the context of a union organizing campaign, those rights include not only an *individual* right to choose without fear of reprisal, but also a correlative *group* right of self-organization, so that employees may establish a collective bargaining relationship in the manner contemplated by the statute. A remedial philosophy that focuses exclusively on repairing the harm to individual victims, and neglects the general assault on freedom of association, will inevitably fail to promote the statutory objective.

43. If the employer's purpose were only to punish the individual worker for supporting the union, the law might well redress the harm by restoring him/her to the job, and making up the

income that s/he has lost. But if the real objective is to break the momentum of the organizing campaign, to eliminate an influential employee advocate, or to send a graphic message to other employees, the set-back to the employees' quest for a collective voice in the workplace may not be so readily remedied.

44. It is not easy to calculate the value of the employees' "lost opportunity" to make a fair and free choice about trade union representation. It is not easy to repair an administrative process that depends for its efficacy on the free exercise of employee wishes. It is not easy to assess the value of lost leadership in the formative stages of an organization - although it is perhaps self-evident that a voluntary organization, be it a club, church or trade union, depends upon the zeal and commitment of its core members. However intangible these qualities of energy or commitment may be, a voluntary organization like a trade union cannot form or function without them - particularly in its early stages when workers may be unfamiliar with their rights, when the statutory freeze or "just cause protection" may not yet have been triggered (see sections 81 and 81.2 of the Act) and employers may be more inclined to resist unionization, legally or illegally. For it is a sad fact of the industrial relations scene that almost fifty years after the employees' right to collective bargaining was entrenched in law, some employers continue to resist the exercise of those rights, or penalize employees who dare to do so. That is why section 111 of the Act preserves the anonymity of union supporters, lest their identification expose them to employer reprisals. If the Legislature had been confident that employees had nothing to fear, or Board remedies were a complete answer to illegality, it would not have shrouded the organizing process with such secrecy (incidentally reversing, by statute, the decision of the Supreme Court of Canada in *Globe Printing Co.* [1953] 3 DLR 561).

45. A remedial approach that does not take into account these labour relations realities will necessarily be deficient, and to that extent ineffective, as either redress or deterrent.

46. Where the Board concludes that a breach of the Act has occurred, it is required to construct a *remedy* that is sensitive to these concerns and, insofar as possible, rectifies the labour relations status quo disrupted by the illegal act. Where the Board is called upon to grant *interim relief* in a "pending or intended proceeding", it must consider whether an affirmative order is necessary either to neutralize the potential impact of an *alleged* unfair labour practice, or to enhance the Board's ability to address the labour relations situation, whether or not an unfair labour practice has occurred.

47. It must be recognized that early intervention, stressing immediacy rather than severity, can have a powerful preventive effect and reduce the necessity for later more intrusive action. Whatever balance may commend itself in particular cases, self ordering is preferable to Board intervention, and an early, moderate response may encourage accommodation and may be preferable to a later, more intrusive one. It is in no one's interest to encourage layers of litigation. If timely interim relief offsets the potential advantage of illegal action, discourages such action, promotes settlement or reduces the likelihood of further litigation, such results are all completely consistent with the statutory objective.

48. It is essential that Board orders - interim or final - be sensitive to the realities of the workplace; and one such reality is the employee's ignorance of the law. One cannot realistically expect rank and file employees to be familiar with their rights under the *Labour Relations Act*. But one can be sensitive to their fears, and responsive to the concern that the law may favour those with economic power or the ability to act unilaterally. Accordingly, quite apart from the relief available to aggrieved individuals, there may be an independent value in an order that reassures other workers that the law stands above the fray, and proclaims that the legal result will rest on statutory principles, not the personality or relative power of the participants. In our system of industrial relations there is ample scope for the exercise of economic power, but it is not, and cannot be, the basis for resolving statutory rights.

49. As the Board noted in *Radio Shack*, and we here repeat: a remedial order (be it interim or final) can, and often should, include an informational component - not least because the discharge of union supporters in the midst of an organizing campaign may have an adverse impact *regardless of the propriety of such discharge*. An employer's actions may inhibit the exercise of employee rights, *whether or not it intends to do so*; and may undermine the mechanism for testing employee wishes, whether or not there is ultimately a finding of illegality. Again, timely

intervention, without finding of fault, may be the most appropriate course in such circumstances, in order to promote the statutory policy, and protect the established administrative processes.

50. On a motion for interim relief, it is neither necessary nor desirable for the Board to make any determination of the merits of the underlying application (here an unfair labour practice complaint with a certification application in the wings). The Act and Rules both contemplate a summary process, based upon written material, where there may not even be a formal hearing (see section 104(14) and Rules 92 and 93). Within that framework, it is neither fair nor feasible to try to resolve disputed facts or explore the nuances of the law. That is best left to the hearing “on the merits”, where the Board will have to hear directly from witnesses whose credibility could be an issue, and the parties will have more flexibility to develop their case in their own way.

51. Of course, under section 92.1, the Board will have to take into account the kind of case it has before it, what we have described as the “contours” of the case (including disputed facts), and the likely disposition should one party or the other be successful. But, on an application for interim relief the focus is on preserving rights pending the hearing on the merits, rather than a meticulous assessment of the relative strength of each party’s case. Accordingly, a party may be entitled to an interim order or interim relief if the material filed establishes an “arguable” or *prima facie* case for the ultimate relief requested.

52. In the instant case, there is not much doubt that the applicant meets that threshold. Where the union’s two key organizers are unexpectedly discharged at the height of the organizing campaign, there is a *prima facie* case of a breach of the Act, and there is reasonable cause for employees to believe that an unfair labour practice has occurred; moreover, in cases of this kind, where the employer bears the legal onus of establishing that it has *not* contravened the Act, it is hardly surprising that the union requests that the “pre-discharge” status quo be maintained until the employer meets the statutory onus cast upon it. If the employer is obliged to establish that its removal of the employees from the workplace was *not* unlawful, there is nothing counter-intuitive about keeping them there until it does so. However, quite apart from the question of legal onus or the strength of the union’s case, we are satisfied from the material before the Board that there really are reasonable grounds for the employees *to believe* that Cake and Sweetman were discharged because of their trade union activities (whether they were or not); and that that situation is likely to persist unless the Board intervenes, and until the employer establishes that these terminations were not in fact tainted by any anti-union motivation.

53. In other words, whether or not the employer is ultimately successful on the main application, the sequence of events under review is likely to inhibit the free exercise of employee rights, unless there is some positive and tangible assurance that those statutory rights will be protected. If an outsider regards these discharges as at least suspicious, an employee in the workplace would reasonably fear the consequences of his/her involvement with the union. And that, in fact, was Sweetman’s experience when he approached individuals who had previously expressed some interest in collective bargaining. Thus, whatever the motive for these discharges may actually have been, there is likely to be an adverse impact in the workplace until the aggrieved employees’ rights are resolved through impartial adjudication.

54. The question, though, is whether some interim direction is appropriate to address these concerns, and, if so, what form it should take.

55. In answering that question, we do not think it is very helpful to consider what a Court might do on an application for an interim injunction. For the reasons already outlined, we see no reason to import common/civil law considerations into the interpretation or administration of the *Labour Relations Act* (i.e., the Rules of Equity, undertakings as to damages, etc. - again, see the comments of Laskin, C.J.C. in *Tomko*, *supra*). On the other hand, we do think it is necessary to consider what “harm” may occur if an interim order is not granted, and what “harm” may occur if it is granted; moreover, that assessment should be made from a labour relations perspective, having regard to the scheme and purpose of the Act, of which section 92.1 is a part. In our view, the interests to be considered include those of the employer, the union, the aggrieved employees, and other employees in the workplace who may be effected by the con-

duct under review. However, we also think we should consider what may be described as a “general” or “public” interest in ensuring that the statutory objective is achieved, insofar as possible, in accordance with the administrative process prescribed, without protracted litigation. To the extent that the early intervention can have a moderating or prophylactic effect, that course is to be considered.

(emphasis original)

12. With this jurisprudence as a backdrop, we turn to the facts before us. The applicant in this matter asserts that Messrs. Bijelic and Kelly were discharged as a result of their union organizing activities. There is little doubt that if this is true, it represents an arguable violation of the *Labour Relations Act*. As a result, that ingredient of the Board’s test has been satisfied.

13. In considering the relative harm to the parties, the applicant maintains that the discharge of the two employees creates an environment of intimidation which may adversely affect the outcome of the applicant’s certification efforts. The responding company asserts that Messrs. Bijelic and Kelly were discharged because of various incidents of verbal abuse, insubordination and belligerence, that Mr. Kelly has a firearm collection in his condominium unit, and that the continued presence of these employees will jeopardize the health and well being of other employees, some of whom will resign if the two men are reinstated even temporarily. In addition, the company asserts that interim reinstatement will jeopardize its contractual relations with the condominium corporations at the site.

14. In *Loeb Highland, supra*, the Board made these comments with respect to the chilling effect of the discharge of employees involved in union activities during an organizing campaign:

36. Moving on to the specific balance of harm in this case, the Board has frequently recorded the chilling effects of a discharge of a union organizer on an organizing campaign. For example, in *Valdi Inc.*, [1980] OLRB Rep. Aug. 1254, the Board said as follows:

However, the impact of unfair labour practices are seldom confined to an economic impact. For example, the isolated dismissal of an employee in the midst of or at the outset of an organizing campaign is likely to have a significant “chilling effect” on other employees who witness the incident and understand its origin. The dismissal of a fellow employee for union activity conveys a strong warning to other employees and can bring a stop to an ongoing drive in its tracks. The mere reinstatement of the employee directly affected, with back-pay some time later, may do little to assure his or her fellow employees that the employer is prepared to live within the requirements of the statute and that effective remedies exist of those occasions where he will not.

37. Moreover, the Board has found on quite a number of occasions that the discharge of a union organizer during a union campaign may lead to a situation where the true wishes of employees can no longer be ascertained, despite the Board’s ability to reinstate the organizer. In other words, the intimidatory effect is so powerful that employees can no longer express their real views on unionization, with the result that certification is granted without a test of employee wishes. For example, in *DI-AL Construction Limited*, [1983] OLRB Rep. Mar. 356, the Board said in this regard:

A discharge is one of the most flagrant means by which an employer can hope to dissuade his employees from selecting a trade union as their bargaining agent. The respondent’s action in discharging Mr. Holland because of his support for the union would have made clear to employees the depth of the respondent’s opposition to the union and likely have created concerns among them that if they were also to support the union, it might jeopardize their own employment. In the face of the discharge I doubt that the employees would now be able to freely decide for or against trade union representation. This is particularly so given the small size of the bargaining unit and the respondent’s earlier conduct. In these circumstances, I am satisfied that

because of the respondent's unlawful conduct, the current true wishes of the employees are not likely to be ascertained in a representation vote.

38. Similarly, in *Zenith Wood Turners Inc.*, [1987] OLRB Rep. Nov. 1443, the Board was faced with a situation where a company had laid off a number of employees during an organizing campaign in violation of the *Labour Relations Act*. In this case, however, the company recalled the employees shortly thereafter and issued a letter indicating that employees were free to choose union representation or not. The Board found that the damage had already been done, despite the recall and letter, and that employees were no longer able to express their true wishes with respect to union representation. The Board came to a similar conclusion in *Elbertsen Industries Limited*, [1984] OLRB Rep. Nov. 1564, despite the reinstatement of an employee laid off in violation of the Act, although there were other factors which resulted in that finding as well.

39. Why is the impact so severe when a union organizer is discharged? The Board has previously commented on the peculiar vulnerability of employees who depend on the employer for their livelihood. In *Pigott Motors (1961) Ltd.* (1962), 63 CLLC ¶16,264, the Board said:

There are certain facts of labour-management relations which this Board has, as a result of its experience in such matters, been compelled to take cognizance. One of these facts is that there are still some employers who, through ignorance or design, so conduct themselves as to deny, abridge or interfere in the rights of their employees to join trade unions of their own choice and to bargain collectively with their employer. In view of the responsive nature of his relationship with his employer, and of his natural desire to want to appear to identify himself with the interests and wishes of his employer, an employee is obviously peculiarly vulnerable to influences, obvious or devious, which may operate to impair or destroy the free exercise of his rights under the Act.

In *Roytec Vinyl Co.*, [1990] OLRB Rep. June 727, the Board commented on this problem in another context:

In the Board's experience, employees are often concerned that they may be subject to such reprisals by their employer for union activity. The Board's jurisprudence is replete with examples of employees who were discharged or penalized in some way, at least in part, because of their support for unionization. For an employee who fears that joining a union will lead to a discharge or other penalty, the result he or she contemplates can be a loss of economic security, the loss of the social milieu of the workplace, a concomitant loss of self-esteem, identity or social standing, the uncertainty of finding another job and the possibility of a slide onto social benefits. Of course, in most cases such a bleak picture will not come to pass; nevertheless, the mere possibility of any of these consequences may exert a powerful influence on an employee contemplating collective bargaining, a regime frequently not welcomed by employers.

For similar reasons, a discharge has been referred to in arbitral jurisprudence as the "capital punishment" of labour relations.

40. The combination of the economic vulnerability of employees and their assumption that an employer does not welcome a union means that a union organizing drive is a relatively fragile enterprise in which momentum is often critical. Where a campaign is disrupted by an unlawful discharge, the Board's jurisprudence under section 9.2 of the Act reflects the fact that such momentum cannot easily be restored by the reinstatement of an employee at some point farther down the road.

Again, we find the following excerpts from *Tate Andale*, *supra*, a convenient way of expressing our views in this regard:

56. What is the "harm" potentially suffered by the union, the employees, and the process, if interim relief is not granted - that is, if the Board does not reinstate the grievors, or otherwise take steps to restore the labour relations status quo prevailing at the time of their discharge? Least significant, we think, is the potential wage loss to the aggrieved employees, which is fully

recoverable (if they are successful) within a few weeks, and, in Sweetman's case, is moderated by the fact that he has already received some severance pay. More important, in our view, is the likely impact on other employees, who may have had an appetite for collective bargaining, but have just seen the union's two principal proponents summarily removed from the workplace in the midst of the organizing campaign. This is not a neutral event, and it would be totally unrealistic to expect employees to regard it that way.

57. It is one thing for lawyers to be confident in the efficacy of the legal process to vindicate statutory rights. It is quite another to expect employees to have such confidence, or to still the nagging suspicion that relative economic power might influence the result. Nor is this idle speculation, for even among sophisticated labour law practitioners there is an ongoing debate about the utility of Board remedies, and since the early 1970's the Statute has been amended on several occasions to broaden the remedial options - suggesting, we think, some Legislative doubts about the effectiveness of what was there before. And unless the Board does so, there may be no authoritative voice to reassure employees of their statutory right to join a union, or not, free from improper interference.

58. For most employees, the law is an unfamiliar, even alien abstraction. The reality is the employer's economic power and the "right" (or at least opportunity) to move unilaterally to deprive them of their livelihood. Accordingly, the most effective way to counteract the "message" of a summary discharge is an equally speedy reinstatement - *accompanied by formal notification to employees of the terms and limits of such temporary reinstatement, as well as a summary of their statutory rights*, in order (to use the words of the panel in *Radio shack*) to "take account of the economics and psychology permeating the situation at issue". Indeed, in the context of an organizing campaign, where the certification application has not yet been disposed of, that Board response is particularly attractive, unless there are compelling employer interests that point in some other direction. During this sensitive period, labour relations realities commend this prophylactic approach.

(emphasis original)

15. In the case before us, we are satisfied that not reinstating Messrs. Bijelic and Kelly may well have a serious chilling effect on the support of employees for the union. As a result, we turn to the harm which may flow from granting the order requested.

16. It is fair to say that the material filed by the responding company is rather overstated in this regard. Some of the incidents cited in support of the position that the presence of the resident superintendents in the workplace creates an "atmosphere of terror" do not provide that support. We note in particular that some of those incidents occurred up to a year ago, without, it appears, much concern being exhibited by the company at the time. It is difficult to imagine that interim reinstatement for what appears will be several weeks will make a significant difference in these circumstances.

17. An important factor in our decision is that Mr. Bijelic and Mr. Kelly are still residing in the workplace. Residence is one of the employment benefits of a resident superintendent, and although the company has commenced proceedings to evict the two men, a hearing in this regard has not been scheduled until October 18th. In other words, even if we do not reinstate them to employment on an interim basis, they will still be present in the workplace. Thus the harm the company projects from their presence alone is not particularly influential with respect to the issue of reinstatement. Indeed, it appears to us that reinstatement may even minimize possible harm, by giving the company more control over two individuals who will be present in the workplace in any event.

18. Having regard to the Board's jurisprudence and the submissions of the parties, we found that the harm which might flow from granting the interim relief requested did not outweigh that which might stem from refusing the order. In light of the specific facts before us, however, we

moved up the hearing date of the section 91 complaint so that based on the parties' estimates of the number of hearing days required, the hearing would be completed by the time the eviction proceedings commence.

1271-92-G Labourers' International Union of North America, Local 1036, Applicant v. The Corporation of the City of Sault Ste. Marie, Responding Party

Construction Industry - Construction Industry Grievance - Municipal employer and union disputing interpretation of subcontracting provision inserted into collective agreement by arbitration board - City asserting that subcontracting provision only applying to transfers of work where City initially itself acquired contractual obligation to perform work - Union asserting that subcontracting provision applying whenever City having it within its power to pass on "down the chain" obligation to do construction work - Both interpretations rejected by Board - Board finding that arbitration board intended to distinguish between "prime" contracts and "subcontracts" and that collective agreement restricting subcontracting, but not restricting letting of prime contracts - Five grievances dismissed and one allowed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *F. B. Reaume* and *B. L. Armstrong*.

APPEARANCES: *S. B. D. Wahl* and *Wm. Suppa* for the applicant; *Mark Contini* and *C. Roy Bernardi* for the responding party.

DECISION OF VICE-CHAIR S. LIANG AND BOARD MEMBER B. L. ARMSTRONG; April 22, 1994

1. This is a referral of grievance to arbitration, brought pursuant to the provisions of section 126 of the *Labour Relations Act*. At the time this matter came on for hearing, it involved approximately 52 separate grievances filed by the Labourers' International Union of North America, Local 1036 (referred to herein as "the Labourers" or "Local 1036"), between April and November of 1992. The parties have agreed to have the Board hear six of these grievances initially, in the hope that the disposition of these will be of assistance in resolving the remaining ones.

2. On the first day of hearing, a representative of the International Union of Operating Engineers, Local 793 appeared. Mr. Edward Kaplanis stated that he wished it to go on record that Local 793 has an interest in these proceedings, and wished to reserve to his union the right to participate. Upon hearing the representations of the parties, it became apparent that the interest claimed by Local 793 was based on the fact that some of these grievances relate to contracts given by the Corporation of the City of Sault Ste. Marie ("the City") to companies which used members of Local 793 to perform the work. It also became apparent that the main issue underlying these grievances is the scope of the "sub-contracting" provision contained in the Labourers collective agreement with the City. Mr. Kaplanis stated that this issue does not concern Local 793 and he was therefore not seeking to participate until such point as it turns out his union's interests are affected. On this basis, the Board agreed to hear the six initial grievances, and left open the right of Local 793 to request standing at a later point in these proceedings (without deciding whether it ought to be granted such standing).

3. The parties agreed that while the Board would remain seized of the rest of the grievances, this panel is not seized.

4. On January 26, 1993, on the third day of hearing, a representative of the Canadian Union of Public Employees, attended the hearing. Mr. Ken Charsley continued to be in attendance for most of the rest of the hearing, but indicated that he was not requesting standing and was only present for the purpose of observation.

Introduction

5. As indicated above, the main issue of contention underlying all of these grievances is the scope of the subcontracting provision found in the collective agreement. That provision reads:

20:01 The Employer agrees to engage only subcontractors who are in contractual relations with the Union.

6. This collective agreement is the first one between these parties. The provision above was inserted into the collective agreement by the decision of a board of arbitration established pursuant to the provisions of section 40a [now 41] of the Act. In fact, the subcontracting provision was the *only* issue on which the parties failed to reach agreement by the time the first contract arbitration took place. As well, the issue of subcontracting was the focus of the union's application under section 40a for a first contract direction and the focus of the Board's decision made on September 9, 1991 to direct first contract arbitration.

7. In a sense, therefore, the current disputes are an extension of disputes which have been outstanding between the parties since the commencement of collective bargaining, in 1989. The City has taken the position throughout that it is entitled to transfer work covered by the collective agreement to other employers. The Labourers have taken the position that any transfer of work may only be to other employers bound to its collective agreement. These positions predated the existence of the subcontracting provision before us. Today, the parties continue to take essentially the same stances, only now, it is advanced in the form of fundamentally irreconcilable interpretations of the subcontracting provision.

8. The City asserts that the subcontracting provision only applies to those transfers of work where the City has initially itself acquired a contractual obligation to perform the work. In other words, only where the City has become a *contractor* bound by contract to perform certain construction work, can it *subcontract* that work to another entity.

9. The Labourers, on the other hand, assert that the subcontracting provision applies *whenever* the City has it within its power to pass on "down the chain" the obligation to do construction work.

10. The importance of this dispute to the parties is highlighted when this bargaining relationship is looked at in the context of the City's own workforce. At the time that the Labourers obtained its certificate, the City's own employees (represented by CUPE) had been engaged for many years in construction activities within the Public Works and Traffic Department. After the certificate, Public Works employees continued to be engaged in a regular basis in construction work, as they are today. The City and the Labourers arrived at an accommodation in their collective agreement which recognized this long-standing practice and permitted it to continue, in Article 2:04:

Nothing herein shall preclude the Employer from continuing to assign work normally performed by labourers covered by subsisting collective agreements with the Employer and such assignment of work shall not be in contravention with this agreement.

11. It is apparent, therefore, that the Labourers' bargaining rights for construction labourers has little meaning with respect to the City's direct employees. Despite the inclusion of a union security clause in the agreement requiring membership in the Labourers' union as a condition of employment, the City continues to assign construction work under Article 2:04 to its employees as it has done in the past, without regard to the Labourers' collective agreement.

12. The result of all this, essentially, is that it is only through the application of the subcontracting provision that the Labourers' bargaining rights with respect to the City have any meaning.

13. With this general introduction in mind, we turn to the facts of this case. The Board heard the evidence of fifteen witnesses over eight days of hearing and two days of oral argument. We also received a number of documents into evidence, all of which we have reviewed. Ultimately, most of the essential facts are not seriously disputed. Rather, it is the characterization of these facts on which the parties disagree. Where there is a conflict in the evidence which we have had to reconcile, we have weighed the conflicting accounts and determined what is most probable in the circumstances, making such inferences as are necessary.

14. The Corporation of the City of Sault Ste. Marie is divided into a number of departments, all of which ultimately come under the authority of its Mayor and City Council. Two departments on whose activities we heard extensive evidence are the Engineering and Planning Department and the Public Works and Traffic Department. The Engineering and Planning Department has responsibility for what the City terms as "capital expenditures" on engineered structures, such as roads, sewers and bridges.

15. Capital expenditures are defined by the City in accordance with Ministry of Municipal Affairs guidelines on accounting and reporting requirements for municipalities. A capital expenditure is "any significant expenditure incurred to acquire or improve land, buildings, engineering structures, machinery and equipment" which "normally confers a benefit lasting beyond one year and results in the acquisition or extension of the life of a fixed asset." The guideline also states that an "expenditure on repair or maintenance designed to maintain an asset in its original state is not a capital expenditure."

16. Thus, the City treats as capital expenditures such construction projects as the installation of a new watermain or the construction of a bridge. Each year the Engineering and Planning Department, through the Treasurer, recommends a capital works program to City Council for approval. This program makes reference to specific projects which the Department recommends to the City to carry out.

17. The Public Works and Traffic Department also has responsibility for certain construction projects throughout the course of a year. The type of construction work carried out in this Department is characterized by the City as "operational" as contrasted with "capital works". The term "operational" is applied by the City to construction work whose purpose is repair or maintenance and is not part of the capital works budget. The budget for construction work carried out by the Public Works and Traffic Department is approved by City Council as part of an overall operating budget for the Department. Unlike the capital works budget, approval of these funds is not based on specific projects.

18. The construction work carried out by the Engineering and Planning Department is normally contracted out, through a public tender process. In general, it is the function of the Engineering and Construction Division of this department to look after design, tendering and contract administration of all capital works projects in the City.

19. The tendering process involves the Division putting together tender documents, advertising the tender, and holding a public tender opening. The documentation and pricing is reviewed, and a recommendation is made to City Council about the award of the contract. The Division completes the tender documents, receives the required bonds from the contractor and documents confirming Workers' Compensation clearance, and then a contract is signed between the contractor and the City. The Division gives notice to proceed on the project to the contractor.

20. The Division provides a survey crew to do layout for the project. A construction inspector employed by the City is assigned to the project and keeps daily records which are used, in part, as the basis for progress payments. When the project is completed, a Certificate of Substantial Performance is issued. The City holds back funds under the Construction Lien Act. It also holds back a further portion for a longer period than that required under this Act, as a guarantee.

21. On some projects, the City retains the services of an outside consulting engineer to perform the tasks otherwise undertaken by its Engineering and Construction Division. For example, in 1988, the City hired Proctor & Redfern Limited, a firm of consulting engineers, to perform the design, contract administration and construction supervision with respect to the replacement of a bridge.

22. In addition to the capital works projects which are in the nature of "infrastructure", such as sewer, watermain and roads, the City also undertakes projects in the industrial, commercial and institutional sector. One recent ongoing project has been building work at the Roberta Bondar Park. The City has let out nine contracts through public tender for this work. At least the last six tenders (all but the last of which took place before these grievances were filed) have specified:

The Contractor acknowledges that the Owner [the City] is bound by a Collective Agreement with Local 1036 of the Labourers International Union of North America and with Local 466 of the United Brotherhood of Carpenters and Joiners of America that requires the Owner to engage or use only Contractors who are in contractual relations with these Unions for work in the ICI Sector.

Work under this Contract is designated as ICI Sector Work.

23. There is no dispute that the relevant portion of the Labourers ICI collective agreement has the same subcontracting language as the one before us.

24. While in the normal course, capital works projects undertaken by the City are contracted to outside contractors, there have been exceptions. In 1988 or 1989, to avoid impending layoffs from the Public Works and Traffic Department, some employees of that department were used on a project to re-align Red Rock Road, which was a capital project undertaken through the Engineering and Planning Department. Otherwise, there appears to be no co-ordination or sharing of manpower or services between the two departments on their respective construction work.

25. Some of the witnesses alluded to the fact that many years ago, much more of the work that was undertaken through the Engineering and Planning Department was done by the City's own employees. In recent years, however, with the exception of the Red Rock Road project, that practice has ceased.

26. Construction work which is undertaken by the Public Works and Traffic Department is either performed by City work crews or outside contractors. Sometimes, outside contractors are retained through a tender process. Other times, the arrangement is more informal and can be triggered through a verbal request which is followed by a purchase order. Public Works has a technical services division, supervised by a professional engineer. This division is involved in providing design services and survey services for work done by City crews or outside contractors, and is also involved in producing tender documents for outside contracts.

27. Over the years and continuing today, Public Works has done sewer work, including replacement or placement of catchbasins, manholes and piping, sidewalk repair, permanent repair on roads, traffic sign and signal installation, and many other types of construction work throughout the City. The construction work undertaken by City Public Works crews resembles work which is contracted out by the Engineering and Planning Department. For example, many of the actual tasks performed by City employees in sewer work (excavation, laying and connecting of pipe, backfilling, compacting) are the same as the tasks performed by employees of outside contractors retained through the Engineering and Planning Department to do sewer and watermain work. However, the City characterizes the work performed by the latter as repair or maintenance projects, while the latter are capital works projects, in accordance with the guidelines issued by the Ministry of Municipal Affairs referred to above.

28. We now turn to the six grievances before us.

Avery Construction Limited

29. During the summer of 1992, Avery Construction Limited performed work on Yates Ave. under a contract with the City. This contract was awarded through a formal and public tender process and was administered by the Construction Division of the Engineering and Planning Department. The subject of the contract was the installation of 10" watermain under Yates Ave. The contract also included some sewer laterals, some fire hydrants and the completion of the road which was unfinished at one end. Among the contents of the tender from Avery was a list of subcontractors (two). Before starting the work, Avery was required to submit a Material and Labour Payment Bond and a Contract Performance Bond. The City kept a Construction Lien Act hold-back as well as a further amount for a year. The contract was a unit price contract, ie. Avery was paid for its work according to the quantity of work done.

30. The drawings and specifications for the project were supplied by the City's Engineering and Planning Department. The Department assigned a Construction Inspector to the site for the project's duration, as well as a survey crew as needed. Among the functions of this inspector was the verification of quantities of work completed for payment purposes.

31. The subcontractors listed by Avery were Chris Tranberg & Sons and Towland-Hewitson. Tranberg was retained to do seeding, mulching and sod work. Towland-Hewitson did the final resurfacing of the road. During the course of the project, Avery also let out some work to Soo Coring, for the boring of holes into the sewer main as part of the sewer laterals installation. Northern Fencing was also contracted by Avery to remove a fence.

32. The work performed by Avery employees included excavation, laying and connecting of pipe, backfilling and compacting.

Double S Construction Limited

33. During August of 1992, the City, through Public Works and Traffic, retained Double S Construction Limited to install a spacer onto a pole holding a traffic sign. This traffic sign had been hit by a vehicle the day before. The City needed a new sign, plus an extension to the pole since it was clear that the sign had not been placed high enough. City crews in Public Works fabricated the new sign as well as the spacer. However, since the City was shortstaffed at the time, and needed the work done very quickly, it decided to call in an outside contractor to install the spacer onto the pole, and retained Double S to do the work. If the City had had the available staff, it would have installed the spacer using its own crews.

34. The work consisted of unbolting the structure, placing the spacer block on the existing base, bolting it, then re-assembling the sign. The spacer block was a fabricated steel piece which raised the sign by about eighteen inches. A boom truck was used to lift the existing sign off and place the spacer on the base. The work was done under a purchase order, paid on a time plus materials basis. The instructions for the work were conveyed verbally, in an on-site meeting between a City manager and Double S.

35. The responsibility for the above work came under the Traffic and Communications division of Public Works and Traffic. Among the work which is done by this division is road painting, sign installation and traffic light installation in new subdivisions. City crews perform this work after the roads in a subdivision have been completed.

36. Other work which has been done by Double S for the City is road sign erection and traffic light installation. In general, the work of the company is chain link fencing, utilities and electrical. The City's manager testified that he called on Double S because he considered this work as utilities work, and Double S as a utilities contractor.

Mr. Sealer

37. This grievance concerns work performed by "Mr. Sealer" under a contract with the City over approximately two days in the summer of 1992. The work involved the routing or sealing of asphalt or concrete cracks on road surfaces in the City. The purpose of the work was to seal the existing road surface so that water would not enter through the cracks and cause problems once frozen. The work was put out for tender by the City, through the Public Works and Traffic Department. The specifications used by the City came from the Ministry of Transportation. Once Mr. Sealer obtained the contract and was ready to start the work, a City survey crew from Public Works attended at the site to direct the company as to the specific cracks to be sealed. As well, this crew measured the work done for payment purposes, since Mr. Sealer was paid by the lineal metre of surface sealed.

38. The work consisted of cutting the asphalt at the crack with an asphalt saw, blowing out excess dirt, filling the crack with hot asphalt to the surface of the road and strewing sand on top of the surface. During the performance of the work, a lane of traffic might be diverted, but the road was still usable.

Palmer Paving and Construction Ltd.

39. This grievance relates to work performed on Pleasant Dr. on August 26, 1992. The evidence revealed that on August 26, City Public Works crews were engaged in permanent repairs to road bases on various streets in the City. The work done by the City crews involved removal of the asphalt, removal of the road base and replacement of the road base. Sometime later, different City

crews were involved in the replacement of the base coat of asphalt. The City retained a contractor, Towland Hewitson to replace the top coat of asphalt.

40. In addition to its own forces and equipment, the City hired three tandem trucks for the purpose of performing the above work. One of these trucks was rented from Palmer Paving and Construction. The City has a list titled "Hired Truckers - Tandem" from which it hires trucks. Palmer Paving and Construction is listed on this list as a source of rentals. Whenever Public Works requires a truck, it telephones the persons or companies on this list, starting at the top (like a seniority list) and working down the list. The person or company is paid on an hourly rate. Trucks which are rented are supplied with an operator. This person is not expected to or ordinarily performs any work outside of the truck.

41. We find that on August 26, 1992, the City engaged a truck with an operator from Palmer Paving and Construction. We also find that this operator did not perform any work outside the truck, but was engaged in driving the truck and hauling material to and from the job sites.

42. Although the grievance alleges that Palmer Paving and Construction was doing work on sidewalk, curb and gutter construction on August 26, the evidence does not establish this.

Ro-von Construction Limited

43. This grievance concerns work which was performed by Ro-von Construction Limited in a new subdivision. The work was performed by Ro-von pursuant to a contract with Mr. A.J. Piscipo and Dr. E.T. Piscipo, the developers of the subdivision. Ro-von installed sewer and watermain and connected the services to existing sanitary sewer lines. The contract was obtained through a tender process supervised by Proctor & Redfern Limited, the Consulting Engineers retained by the developers, who also provided engineering design and field services and contract administration services with respect to the subdivision development.

44. Ro-von itself has engaged at least one sub-contractor with respect to the work covered by its contract with Piscipo-Dionisi, Benchmark Construction, and will likely engage an asphaltting subcontractor to complete the road-work.

45. There is a subdivision agreement between Piscipo-Dionisi and the City relating to this development in which, among other things, the developers agree to construct certain municipal services such as sanitary sewer, storm sewer, and roads. The plans and specifications for this work were produced by Proctor & Redfern and approved by the City's Engineering Department. There is provision in this document for City approval of contractors used by the developer. In this case, there was no formal approval of Ro-von, because Ro-von is a well known contractor that has done extensive subdivision work.

46. The developers have a separate agreement with the Public Utilities Commission for the installation of watermain, underground electrical wiring and street lighting and the specifications for these are established by the PUC.

47. While the work done by Ro-von was in progress, the City's Drainage and Subdivision Engineer (from the Engineering and Planning Department) visited the site on a regular (daily or every other day) basis, to ensure that the work being done was constructed to City standards. The City takes over ownership of these works after their construction.

Northern Fencing

48. The evidence regarding this grievance was very thin. Bill Suppa, Business Agent for the applicant, testified that he saw an unmarked truck at the Queen Elizabeth baseball complex. He witnessed a worker appearing to be in the progress of fixing a fence. Since he was driving by in his vehicle at the time, Mr. Suppa did not observe much of the work being done, but observed the worker trying to pull fencing over to a post. In later discussions with Roy Bernardi, the City's Commissioner of Personnel, Mr. Bernardi told him that the company's name was Northern Fencing and that it involved an "insurance claim".

49. Bill Pletsch, the City's Construction Engineer, testified that he searched through City records for a record of any work performed for the City at the Queen Elizabeth baseball complex relating to fencing, and was unable to find anything.

50. To date, since the beginning of this collective agreement, there have been no instances where the City has engaged a contractor to perform construction work where it had a prior contractual obligation to perform the work. In fact, to date, the City has not engaged *any* contractors who are in contractual relations with the union, although it is apparent that it is regularly in the practice of engaging contractors to perform construction work.

51. The parties' arguments are presented in necessarily abbreviated form. Counsel for the Labourers states that the focus of subcontracting language is the passing of work "down the chain." An employer passes an obligation to do work to another employer. The reason that the word "subcontractor" is used is to make it clear that the cause does not prevent an employer from *obtaining* work from a non-union source. However, it prevents an employer from *passing* the work to a non-union employer. In counsel's submission, the interpretation given by the City to this clause, and which the City urges the Board to adopt, is based on a court-based contracts doctrine which ignores labour relations realities. The distinction which the City urges between "contracting out" and "subcontracting" is a distinction without a difference.

52. Ultimately, all of the decisions which the City takes in determining whether to use its own forces to do construction work, or to engage outside contractors, are in the exercise of its management rights. The City has the choice of whether to use its own employees to do work, or engage other contractors. In making this choice, the City takes into account such factors as its physical capacity to do the work, its technical expertise, and its desire to pass on warranty obligations.

53. The Board ought not to find any significance in the City's own characterizations of some projects as "capital works" and others as "operational". Whatever the characterization, the City's management and supervision of the various projects are the same. The City has on-site inspection and supervision of a project, whether it be through a foreperson on a Public Works crew or a Construction Inspector from the Engineering and Planning Department. The City has control over how the project is done, whether through instructions to its own crews or plans and specifications binding on a contractor. By deciding on the characterization of a project as "capital works" or "operational", the City is in effect deciding whether to use its own employees, or to engage other contractors, to do the work.

54. The City has, over the years, done many significant construction projects with its own

crews. It regularly and continuously acts as a construction contractor. The work which its own crews have performed is not distinguishable from the work performed by other contractors for the City. By inserting a "union only" clause in tenders for ICI projects, the City has shown that it considers itself to be a contractor in the construction industry.

55. With respect to the particular grievances, the City had the same power and authority with respect to the progress of the work on Yates Avenue as a general contractor has on a project. The City performed the same functions in supervising Avery Construction as Avery performed in supervising its subcontractors. The functions carried out by the City with respect to this project reveal that it was functioning as a contractor in the construction industry. The decision that it makes to engage another contractor to perform this work is the same decision, based on the same considerations, as general contractor would make.

56. With respect to the Palmer Paving, Double S, Northern Fencing and Mr. Sealer grievances, counsel urges that these are all instances in which the City engaged a contractor to perform work covered by the Labourers' collective agreement, in contravention of the subcontracting provision.

57. Turning to the Ro-von Construction grievance, counsel acknowledges that there have been no cases in which the Board has applied the subcontracting language in a collective agreement to a situation where it is not the City that engages a contractor to perform work, but rather a developer which is also bound to a subdivision agreement with the City. However, there is no reason to limit its application. Where the City has power to control the development of a site, through a subdivision agreement, the situation is not functionally different from that where the City engages the contractor. The subcontracting provision should apply wherever the employer has the power to pass on an obligation to do work to another. Privity of contract may be essential in a contracts dispute, but it should not constrain the Board in applying a collective agreement in accordance with labour relations realities.

58. Finally, counsel for the Labourers states that to adopt the meaning of this provision urged by the City would be to render the Labourers' bargaining rights meaningless. Such a result would be perverse given the extensive discussions by the Board in previous cases, and by the board of arbitration which imposed this clause in the agreement, as to the importance of subcontracting provisions as a form of union security in the construction industry. In this bargaining relationship, the subcontracting provision is the *only* meaningful locus for the Labourers' bargaining rights, since the City and the Labourers have agreed that the City is entitled to continue to assign work covered under the agreement to its own employees who are members of CUPE.

59. Counsel for the City agrees with counsel for the Labourers that the distinction between capital works projects and operations projects is irrelevant for the purposes of interpreting and applying the subcontracting provisions of this collective agreement. In counsel's submission, what is dispositive of these grievances is that in no case was the City under a *contractual* obligation to perform the work which it passed on to other contractors. The law is clear that this is what defines the difference between contracting out, which is not restricted by the agreement, and subcontracting, which is. There should be no ambiguity about the meaning of this provision, having regard to the Board's cases and other authorities which define "subcontracting".

60. If there is any ambiguity in this term, the Board has compelling extrinsic evidence before it in the form of the decision by the board of arbitration which considered the parties' positions and inserted this particular provision into the collective agreement. When one makes reference to the bargaining on this subject and the positions taken by the parties before the board of

arbitration, it is clear that what the union seeks to achieve by these grievances is precisely what it failed to get in bargaining and in the arbitration process.

61. In response to the union's arguments, counsel submits that it is not true that the result of the City's interpretation of these provisions is that the Labourers' bargaining rights are rendered meaningless. It is possible, for example, that the City might take on a contractual obligation to do construction work in a situation where a utility company like Bell Canada wished the City to perform some underground work where the City is already excavating in a specific area. Further, to the extent that the bargaining rights of the Labourers' are limited, it was the Labourers' themselves that agreed to Article 2.04 of the collective agreement, permitting the City to continue to assign work performed by its own forces to CUPE members.

62. With respect to the specific grievances, as stated above, it is the City's position that the proper interpretation of the subcontracting provision is dispositive of all the grievances. In any event, it is submitted, there are other valid defences to each grievance. In the case of Avery Construction, there is no question but that Avery is the prime contractor on the project. Any subcontractors engaged were engaged by Avery, and had no contractual relationship with the City. In the case of Ro-von, there is clearly no contractual relationship between Ro-von and the City and thus no basis to apply Article 20.01, even on its broadest interpretation.

63. In addition to its argument that these companies are prime contractors, not subcontractors, the City states that the work performed by the employees in the Palmer Paving and Double S grievances is not the work of construction labourers. Further, the work performed by the employees in the Mr. Sealer grievance is not construction work, but maintenance work.

64. Finally, counsel submits that the grievance with respect to Northern Fencing has simply not been proven. There is no evidentiary basis on which the Board can make any findings that there is work covered under the Labourers' collective agreement which the City subcontracted to a company not in contractual relations with the union.

65. In their arguments, counsel referred the Board to the following cases: *The Metropolitan Toronto Apartment Builders Association*, [1978] OLRB Rep. Nov. 1022; *Bricklayers, Masons, Independent Union of Canada, Local 1* (1979) 24 O.R. (2d) 394; *The Brant County Board of Education*, [1984] OLRB Rep. Oct. 1349; *Brant County Board of Education*, [1986] OLRB Rep. Sept. 1187; *Dalton Engineering & Construction Limited*, [1988] OLRB Rep. June 567; *Pigott Construction Limited*, [1990] OLRB Rep. Apr.. 441; *The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. Mar. 279; *Bonik Incorporated*, [1991] OLRB Rep. Mar. 292; *The Municipality of Metropolitan Toronto*, [1980] OLRB Rep. Jan. 62; *Kapuskasing Board of Education*, [1981] OLRB Rep. Mar. 300; *Runnymede Development Corporation Ltd.*, [1987] OLRB Rep. Nov. 1423; *Litwin Construction (1973) and O'Brian Financial Corporation* [1982] 2 Can L.R.B.R. 349; *The Board of Education for the City of Windsor*, [1988] OLRB Rep. Mar. 342; *School Board No. 36 (Surrey)* decision of the Labour Relations Board of British Columbia dated September 23, 1976; *Abitibi-Price Inc.*, [1986] OLRB Rep. Dec. 1613; *Construction Industry Commission* [1986] 31 D.L.R. (4th) 641 (S.C.C.); *The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. Mar. 279; *Shell Canada Limited* [1992] OLRB Rep. Nov. 1231, decision of the Ontario Labour Relations Board dated November 30, 1992; *Belmont Property Management Ltd.*, [1991] OLRB Rep. Oct. 1117; *Keith Holdsworth Consulting Ltd.*, [1989] OLRB Rep. June 619; *Lever & Associates Contracting Inc.*, [1989] OLRB Rep. June 630; and, *The Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477.

66. It is generally accepted that the fundamental task in the construction of a collective agreement, as in the construction of any contract, is to discover the intention of the parties that agreed to it: see Brown and Beatty, *Canadian Labour Arbitration*. Our task is made slightly different by the fact that the provision with which we are concerned was not agreed to by the parties, but was imposed in the process of a settlement of a first collective agreement by arbitration. Nevertheless, we intend to apply substantially similar principles in our interpretation of this provision as we would apply had the provision been the product of collective bargaining.

67. First, we look to the words of the provision themselves, and the words in the context of the agreement as a whole. We are led to the conclusion that the meaning of Article 20.04 is not self-evident, nor is evident just from an examination of the collective agreement. Whether Article 20.04 concerns *all* contracts between the City and another employer for the performance of work which includes construction labourers' work, or whether the use of the prefix "sub" suggests a smaller category of contracts, is not clear.

68. We also therefore look to the context within which this provision is found, for some further guidance as to its intent and meaning, as both parties did in their arguments. First, we find it relevant to look to the bargaining history between these parties. During collective bargaining for this first agreement, it became clear that the parties were in fundamental disagreement over the issue of a subcontracting provision. The City took the position that the agreement ought not to contain a subcontracting provision of the sort that is commonly found in construction agreements. Then, it proposed the following language:

22.01 The parties agree that the Employer has the right to contract, subcontract, award, assign or in any way transfer work covered by this collective agreement to others, whether or not such others are in contractual relations with the Union.

69. The language which the union initially proposed was the following:

22.01 The employer agrees to contract, subcontract, award, assign, or in any way transfer work covered by this Collective Agreement only to others who are in contractual relations with the Union.

70. The union subsequently amended its proposal to:

22.01 The employer agrees to contract or subcontract, award or assign or in any way transfer work covered by this Collective Agreement only to those contractors who agree to perform such work in accordance with all the terms and conditions of the Collective Agreement.

22.02 In the event that such contractors referred to in Article 22.01 fail to perform such work in accordance with the terms and conditions of this Collective Agreement, the employer agrees that it will be responsible for such violation and fully liable in damages as if the employer had committed the violation itself.

71. In arriving at its decision to order that the first collective agreement between the parties be settled by arbitration, the Board stated that:

...By saying it will not hire persons to perform construction labourers' work under a Labourers' collective agreement and by not agreeing to a subcontracting provision, the Labourers' bargaining rights are virtually meaningless.

72. The Board concluded that by taking these positions, the City was refusing to recognize

the bargaining authority of the Labourers. In arriving at its decision to direct arbitration of the first collective agreement, therefore, the Board determined that the City's position was inconsistent with the union's status as bargaining agent. It is clear that the Board saw a relationship between subcontracting provisions and meaningful bargaining rights in the construction industry.

73. We also find it relevant in our review of the bargaining history that the language proposed by the Labourers is different from that which was ultimately imposed. It is also different from the language in the Labourers' provincial ICI collective agreement, which speaks only of "subcontractors". Rather, the Labourer's proposal refers to the ability to "contract or subcontract, award or assign or in any way transfer work" to "contractors". This *suggests* that the Labourers themselves saw a difference between a provision that referred only to "subcontracting" and a provision which speaks to all manners of transfers, including subcontracting.

74. We would not be inclined to place a great deal of weight on this factor but for the discussion of these very issues in the award of the arbitration board.

75. In the absence of a clear meaning discernible from the words or the agreement themselves, the award of the arbitration board is useful and illuminating evidence as to the intent of this provision. Firstly, the board states clearly that,

...[w]ith nothing more in the collective agreement than what the parties have agreed to, the Union's exclusive bargaining rights for construction labourers would be illusory. With a subcontracting provision of the kind which is typical of collective agreements in the construction industry between building trades unions and employers carrying on business in the construction industry in Ontario, the Union's bargaining rights might retain some meaning and value for the Union's members.

76. In imposing a sub-contracting provision, therefore, the board intended to give meaning to the union's bargaining rights. In this respect, it is useful to recall that at the time the issue came before it, the parties had *already* agreed to Article 2:04, preserving the City's ability to assign work under the collective agreement to CUPE members. Therefore, to the extent the board saw a need to give some meaning to the union's bargaining rights, it was with respect to the employer's ability to transfer work that it focused its attention.

77. However, the board did not impose a blanket restriction on this ability. The board draws a distinction between the language proposed by the union, which refers to both contracting and subcontracting, and the language of other construction agreements, which restrict only subcontracting:

The board is satisfied further from the applicant's documents that it is also the norm for provisions restricting the subcontracting of work to be included in construction industry collective agreements of the Union, its parent Labourers International Union of North America and affiliated local unions, which apply in the geographic area by which the Union's bargaining rights are defined. These are agreements which apply in the ICI, sewers and watermain, roads, heavy engineering and pipelines sectors and in concrete forming construction. The provisions in those agreements, however, as well as in the collective agreements analyzed by the Board, are unlike the provisions proposed by the Union here. It purports to restrict contracting and subcontracting. The provisions in the other collective agreements refer only to subcontracting, not contracting. The Board appears to have determined in at least two of its decisions dealing with subcontracting provisions that subcontracting does not include the letting of the prime contract. In this respect, see *The Municipality of Metropolitan Toronto*, [1989] OLRB Rep. Mar. 279 and *Kapuskasing Board of Education*, [1981] OLRB Rep. Mar. 300 referred to therein.

Therefore, the board finds that the norm respecting contracting and subcontracting provisions for the construction industry within the geographic scope of the Union's bargaining rights is a

provisions which limits subcontracting, using terms the same as, or having similar meaning as, those quoted above from the provincial agreement covering construction labourers.

78. The discussion above leads us to several conclusions. First, it was the clear intent of the arbitration board to insert language into the collective agreement which would restrict the City's ability to use non-union contractors to perform work covered by the collective agreement. The board intended by this to provide language which enhanced union security. Second, it was also the clear intent of that board to provide language which was not as broad as that proposed by the Labourers. The board viewed the language which it chose as a compromise between two positions. In our reading of its decision, the board chose language which draws a dividing line between some contracts let out by the City, and others.

79. Our conclusions above as to the intent of the arbitration board lead us also to reject the interpretations of this provision urged upon us by both parties. The interpretation urged on us by the City, which would narrow the scope of the provision so much as to render it almost irrelevant, is not consistent with its intent and is not required by the wording. Likewise, the interpretation urged on us by the union would give a meaning to the provision which was specifically rejected by the board, that is, that it apply to *all* contracts let out by the City to other employers.

80. It is the City's position that its interpretation of Article 20.04 is consistent with the decision of the arbitration board and indeed, even required by it. The City submits that in referring to *The Municipality of Metropolitan Toronto* (1989) and *Kapuskasing Board of Education*, the arbitration board has implicitly adopted the definition of "subcontracting" applied in these cases which has limited the notion to those instances when the party letting out a contract is itself under a contractual obligation to do the work.

81. For instance, in *The Municipality of Metropolitan Toronto* (1989), *supra*, the Board stated:

37. As "sublet" and "subcontract" are synonymous in this context, the remaining issue in this case is the very issue addressed in *Kapuskasing #2* in 1981, three years before the collective agreement in question here was negotiated. That decision held that "[s]ubcontracting involves the awarding of a secondary contract, whereby a subcontractor undertakes to perform certain of the obligations previously assigned to a principal or prime contractor" and that someone who lets a contract for the performance of work which they are not themselves under a contractual obligation to perform for someone else cannot be said to have "subcontracted" any work. Like the respondent in *Kapuskasing #2*, Metro was under no contractual obligation to any other person to perform the work for which it let a contract to a "non-union" contractor. In the absence of any evidence that the parties to the collective agreement before us agreed at the time on some other meaning for "subcontract" or "sublet", we see no reason not to follow *Kapuskasing #2*, on this issue and find that in contracting with Toronto Metro did not "sublet" work.

38. As the respondent points out, the decision in *Kapuskasing #2* gives the word "sublet" its ordinary meaning. The Shorter Oxford dictionary defines "sublet" as meaning, among other things, "to lease out (work, etc.) under a subcontract". It says the verb "subcontract" means "to make a subcontract" and that the noun "subcontract" means "a contract, or one of several contracts, for carrying out a previous contract or part of it" (emphasis added). The terms "subcontractor" and "subcontracting clause" are defined in *Labour Law Terms: A Dictionary of Canadian Labour Law*, Sack, Jeffrey and Poskanzer, Ethan (Toronto: Lancaster House, 1984) as follows:

subcontractor independent contractor who is engaged by an employer to perform part of the work which the latter has contracted to do; a **subcontracting clause** is a provision in a collective agreement restricting the right of an employer to subcontract bargaining unit work

[emphasis added]

82. We do not find it at all apparent that the Board in *Kapuskasing Board of Education* was adopting a similarly restricted definition of sub-contracting. In *Kapuskasing*, the Board concluded that on the project in question, the school board was simply not acting as a general contractor, accepting the school board's distinction of the facts before it from another case in which the school board *had* acted as its own general contractor. In our view, this decision leaves open the possibility that a school board which undertakes construction work for its own benefit and *not* under any contractual obligation to another party, may be restricted in its subcontracting of work.

83. We do not find the mere reference by the arbitration board to *The Municipality of Metropolitan Toronto* (1989) to establish that the board intended to incorporate all of the conclusions arrived at in that case. The purpose of the reference was to indicate support for the proposition that subcontracting does not include the letting of a prime contract. We do not find that by this reference the arbitration board intended to limit the scope of the subcontracting provision to those instances where the City was under a contractual obligation to perform the work. If this had been the intention, it could have been clearly specified.

84. This is particularly so where the *result* of such an interpretation would be in conflict with the board's extensive discussion of the importance of subcontracting protections in the construction industry. Counsel for the City hypothesized that there may be times when an entity such as Bell Canada engages the City under contract to perform construction work. This possibility was offered as a hypothesis, was acknowledged to be unusual, and no evidence was provided that suggested that this has ever even occurred. To the contrary, it is clear, as we have stated above, that the City has engaged many construction contractors during the life of this collective agreement, none of which were engaged pursuant to a contractual obligation undertaken *by the City* to perform construction work, which became the subject of these grievances. The application of the City's suggested interpretation of the subcontracting provision, therefore, results in almost no restrictions on its ability to subcontract, almost no work for members of the union, and appears to almost entirely undermine the intention of the clause in the collective agreement as expressed by the arbitration board that imposed it. In this context, we do not find that the result intended by the arbitration board was that the restrictions on subcontracting only apply when the City is under a contractual obligation to perform work, nor do we find such a result required by the language which the board provided. Rather, we find it more consistent with the decision of that board to view subcontracting as arising where the City has a responsibility or an obligation to perform the construction work, whether or not this obligation arises under a contract, and then passes on the performance of this construction work to another entity.

85. Not all transfers of work, however, are restricted. We find that the intent of the language chosen is exactly as stated by the board in its decision; that is, to distinguish between "prime contracts" and "subcontracts". The cases referred to by the board make such a distinction, and it was for this purpose that the board referred to them. Therefore, in interpreting and applying the language which was imposed by the board of arbitration, we find that it was the intention of that board to restrict subcontracting but not to restrict the letting of a prime contract.

86. As we have stated above, we therefore reject both interpretations of this provision which have been urged on us by the parties. The parties have not provided the Board with any suggestions as to an alternative interpretation. In advancing their "winner take all" positions, each has rejected the possibility of other meanings which can be given to this provision. It therefore remains to this Board to determine, on the material and evidence before us, the soundest interpretation of the subcontracting clause.

87. We again look back to the award of the arbitration board for illumination as to the

intent of the provision. The board juxtaposes two concepts: subcontracting and prime contracting. These terms refer to a well-established method of organizing work on a construction project, using a hierarchy of contracts in what can be seen as a construction "pyramid". In this construction pyramid, specialty contractors take on a discrete portion of the overall work under the general responsibility of the prime contractor, which also performs some aspect of the construction work. The use of the terms "prime" and "sub" refer to this division of labour and hierarchy of responsibility; where there is a prime contract, there are subcontracts, and vice versa. The use of these terms therefore reflects an intent by the arbitration board to exclude from Article 20:01 those contracts at the top of the construction pyramid, the prime contracts.

88. There are many construction projects, however, that do not use a construction pyramid. For instance, the end product may be so specialized or narrow that it does not require a construction pyramid. A warehouse owner may wish to have a new roof. A school board may wish to have new flooring in its gymnasium. Or, as in the case before us, a municipality may wish to have a traffic post raised. All of these involve construction work but they do not require a hierarchy of contractors under the general responsibility of a prime contractor to achieve the performance of the project (which we define simply as the set of tasks which taken together result in the completion of work required for an identifiable end product by an owner).

89. In this kind of case, the project itself is so narrow and specialized that the owner can achieve the work by letting out a specialty contract at the lowest end of the construction pyramid. We include this type of contract in our definition of subcontract, because to the extent the contractor is given any responsibility over the construction work, it is of a very specialized and limited nature; it is the type of work that in a construction pyramid would be the subject of a subcontract.

90. The facts before us show that many of the construction contracts which originate in the City's Engineering and Planning Department and which are related to "capital projects" are more in the nature of prime contracts. The construction contracts which originate in the Public Works and Traffic Department are more in the nature of subcontracts. The type of projects which originate in Engineering and Planning are not those in which the City's construction employees normally take part and which the City does not have a history of doing. They *tend* to be more substantial projects. In the ordinary course, these are projects in which the contractor receiving the prime contract further engages specialty contractors. The City transfers to the prime contractor the responsibility for engaging the necessary specialty contractors. We use the term "the ordinary course" to indicate that our assessment of the issues does not depend on the unique capacities of the contractor in question. For instance the manner in which the work was performed by Avery Construction is consistent with a general practice familiar to these parties in which, for instance, the sewer and watermain work is separated from the final asphaltting. We find (see below) that its contract with the City is a prime contract. We do not intend to suggest that if another contractor has a unique capacity to perform all the specialty work on the same type of project, and therefore doesn't engage specialty contractors, that we would not consider *its* contract with the City as well to be a prime contract.

91. In any event, on those projects originating from Engineering and Planning where the City transfers the responsibility for the completion of the work to a contractor which in turn engages the necessary subcontractors, the roles of the various parties are akin to those described in the CCDC standard construction contract which was placed before us. The City's role is akin to that of the "owner" while the role of the prime contractor is akin to that of the "contractor" which agrees, under that document, to be solely responsible for "construction means, methods, techniques, sequences and procedures and for co-ordinating the various parts of the work under the contract."

92. In juxtaposition to many of the contracts originating from Engineering and Planning, the contracts which originate in Public Works tend to be at the most specialized end of the construction pyramid, and do not require further subcontracting on the part of the company contracting with the City. They are usually in the nature of repair work. Further, on some of the projects carried out under this Department, the City may let out several complementary contracts to different specialty contractors for specified portions of the work, or may have its own employees do a portion of it. In these circumstances, the City has retained the overall responsibility for delivery of the end product. Whether or not the City uses its own employees to do some of the work, the contracts which are let out to these specialty contractors look more like subcontracts than prime contracts, since they only involve one tier of contracting without a further level of specialization. It would be incongruous to label these as "prime" contracts where it is clear that the contractor does not award any secondary contracts in order to complete the work because the work is such that it does not ordinarily involve further sub-specialization. Therefore, we would view such a contract as more in the nature of a subcontract.

93. As we have stated, we have found on the evidence that the contracts arising out of Engineering and Planning *tend* to be prime contracts. The contracts arising out of Public Works and Traffic *tend* to be subcontracts. The distinction between Engineering and Public Works is not necessarily a complete answer to these grievances. However, we would expect that if the contracts from each of these Departments resembles our general picture, then this distinction will be determinative in many of these cases.

94. In *Kapuskasing Board of Education* (1981), *supra*, to which the board of arbitration referred, the Board found that a contract let out by a school board to a general contractor for the construction of an addition to a school, which resulted in the hiring of specialty contractors by the general contractor in order to perform the work, was a prime contract not prohibited by the subcontracting provision in the collective agreement in question. The result there is consistent with our discussion of the differences between subcontracting and prime contracting. The Board in that case did not have to determine whether the subcontracting provision would have applied if the school board had acted as its own general contractor and engaged the specialty contractors directly.

95. It is less clear that we can reconcile our interpretation of this provision with that applied in *The Municipality of Metropolitan Toronto* (1989), *supra*, since it in that case, the Board applied a definition of subcontracting which depended on a pre-existing *contractual* obligation to perform work. However, as we have stated above, we do not find that the arbitration board in the case before us intended to apply an equally restricted definition of subcontracting.

96. In a given case, it may be that the discussion of the Board in *The Municipality of Metropolitan Toronto* (1989) provides the context in which later negotiations over subcontracting provisions may be understood. Absent any other indications as to the parties' intent, for instance, the negotiation of language identical to that applied in that case might indicate that the parties agreed to adopt the same meaning. However, in the case before us, the award of the arbitration board provides much more compelling evidence of the meaning to be assigned to the provision in this agreement.

97. We stress that our findings as to the meaning of the subcontracting provision binding these parties is not meant to be any general statement as to the meaning of such provisions in the construction industry at large. Rather, we make our findings in the very specific context of these parties, the evidence before us as to the City's practices in effecting non-ICI work, and the award of the arbitration board which provided this language. It may be that in another collective agree-

ment, the same or similar language is intended by the parties to mean something different from the meaning we have assigned it here. For this reason, we do not find persuasive the evidence offered as to the application of the subcontracting provision which is found in the Labourers' provincial collective agreement.

98. We now turn to an examination of each of the grievances.

Avery Construction Limited

99. We find that the contract between the City and Avery Construction for the performance of work on Yates Avenue was in the nature of a prime contract, which is not restricted by the subcontracting clause. The organization of this job was typical of other capital works projects originating from the Engineering and Planning Department. The City assigned responsibility for the delivery of an end product in this project to Avery. Avery in turn engaged certain specialty contractors for portions of the work. The City had some personnel involved in the inspection of this project, and provided a survey crew. Its role in this project is consistent with the role of an owner in many typical construction projects as described in the evidence and in the CCDC standard construction contract. The role the City played cannot be viewed as that of the prime contractor on the project.

Double S Construction Limited

100. We find that the contract between the City and Double S Construction for the extension of a traffic sign post was in the nature of a subcontract. The work transferred to Double S cannot be considered a prime contract since it is not the type of contract which requires the further use of specialty contractors. As an additional factor, it also makes sense to view this work as covered by the subcontracting provision since it is clear that it is work which, but for a shortage of labour, would have been performed by employees of the City. Our finding that this is a subcontract is consistent with the views expressed by the Board in, for instance, *Brant County Board of Education* (1986), *supra* wherein it stated that the "very origin of the subcontracting clause is to prevent an employer bound by a collective agreement from avoiding that collective agreement by contracting out the work rather than performing the work with its own employees." (p. 1188)

101. We therefore find the City in violation of the subcontracting provision in its use of Double S Construction to perform work covered by the Labourers collective agreement. In this respect, we are satisfied that certain work performed by Double S employees was the work of construction labourers. We do not at this point make any determination as to specifically which portions of the work are covered by the collective agreement, because we do not know if this is work in which the Operating Engineers claim an interest (or even if this is a contractor with which the Operating Engineers have an agreement). Therefore, we remain seized of the matter and direct that a copy of our decision be provided to the Operating Engineers, who are directed to notify the Board within two weeks of their receipt of the decision whether they wish to participate in the litigation of the remaining issues in this grievance, and on what basis.

Mr. Sealer

102. We find it unnecessary to decide if the City's contract to Mr. Sealer constituted a subcontract because on the facts before us, we are satisfied that the work was maintenance, and not construction. In *The Masters Insulators of Ontario Inc.*, *supra*, the Board described maintenance work, as distinct from construction work (including repair) in the following manner:

Where the work assists in preserving the functioning of a system or part of a system, such work is maintenance work. Where the work is necessary to restore a system or part of a system which has ceased to function or function economically, such work is repair work. "Maintenance" and "repair" are not mutually exclusive concepts, and lack of adequate maintenance will surely produce a situation where repair becomes inevitable. In our view, the performance of adequate and timely maintenance forestalls or reduces the requirement for repair.

103. The sealing of road cracks for waterproofing purposes was not work done to increase the capacity of the road as a road, or to permit the road to regain its lost capacity as a road. Rather, it was work done to prevent future problems caused by water seeping into the road surface and then freezing. The work performed by Mr. Sealer is similar to work in a parking garage which was the subject of *Belmont Property Management Ltd.*, *supra*, and which the Board described as the "patching and the replacement of a relatively small portion of concrete blocks (when viewed in context of the whole) undertaken as part of a regular and continuous preventative maintenance program designed for the primary purpose of sustaining and protecting an operating system to avert or preclude deterioration. The work was done to protect the structure from corrosion and thereby extend its useful life." (p. 1123)

104. We see no meaningful distinction between the work described above, and the work performed by Mr. Sealer.

Palmer Paving and Construction Ltd.

105. Turning to the grievance respecting Palmer Paving, likewise, we find it unnecessary to determine whether the hiring of a truck and driver on August 26 constitutes a subcontract, since we are satisfied that the work performed under this contract is not covered by the Labourers collective agreement. The recognition clause of this collective agreement refers to "construction labourers". The agreement goes on to state that the work classifications specified in Schedules "A", "B" and "C" attached to the agreement are recognized by the parties as being classifications within the jurisdiction of the agreement. We take from this that the parties intended that the work classifications attached to the collective agreement are a description of the type of work which they agree to be construction labourers' work.

106. Schedule "A", relates to "Civil Engineering and Heavy Construction" which the parties state to include, among other things, roadwork. Schedule "B" relates to "Utility Workers", and Schedule "C" relates to "Wrecking". The work performed by the Palmer Paving truck driver was in relation to roadwork being undertaken by employees of the City. We therefore look to Schedule "A" to determine whether the work of driving a truck in connection to this roadwork is covered by this collective agreement. Unlike Schedules "B" and "C", Schedule "A" is not followed by a description of the work which the City agrees is within the union's exclusive jurisdiction and so our only guide as to whether truck driving for roadwork construction is covered by the agreement is in the list of wage rates. Unlike Schedules "B" and "C", Schedule "A" does not contain a wage rate for "truck driver". We therefore find that the work performed by Palmer Paving for the City on August 26 is not covered by the collective agreement. Since the work is not covered by the collective agreement, it is not restricted by the subcontracting clause.

Ro-von Construction Limited

107. With respect to the Ro-von Construction grievance, we are unable to find a violation of the subcontracting provision because we are unable to find that the City has "engaged" a contractor. On its plain, ordinary meaning, "engage" suggests that there is a direct relationship between the City and the contractor. We do not preclude the possibility that an entity can "engage" another through other than a strictly contractual relationship; however, for such a conclusion to be possible

we would require, at the very least, evidence of a decisive degree of control over the choice of contractor and the responsibility of making that decision. We cannot arrive at such a conclusion on the facts of this case. At most, the facts before us concern a contractor performing work under contract with a developer, which has undertaken certain obligations to the City by way of a subdivision agreement. The City in turn seeks to protect its interests in the eventual works by having an inspector on site, and by having the power to approve the plans and specifications for the works.

108. The union relies on *Litwin Construction, supra*, in its submission that a subcontracting provision is not restricted in its application to formal written contracts, but operates to prohibit an employer from informally or indirectly granting or committing work within the union's jurisdiction to contractors not bound by its collective agreement. Even if we were inclined to read the subcontracting provision before us as broadly as did the British Columbia Labour Relations Board in that case, we do not find the facts before us to indicate that the City was, in essence even if not in form, the entity with which Ro-von contracted.

109. In *Litwin Construction*, the B.C.L.R.B. reviewed the intricate legal relationship between Litwin, a general contractor and developer, OFC, a company which acted as the agent for investors in a MURB project and which "held" the construction contracts, and Absolon Construction, the company performing the construction work in dispute. The B.C.L.R.B. found that despite the absence of a direct contractual relationship between Litwin and Absolon, Litwin was in essence acting as the developer on the project, assembling the property, the capital and the other resources, supervising the construction and taking control of the project. In substance, it was Litwin which engaged Absolon to build the project. The interposition of OFC was necessary for the purposes of the Income Tax Act, which provided a tax shelter for MURB developers, but for the purposes of labour relations, Litwin was the real developer.

110. The facts of the *Litwin* case are quite different from the facts before us. Among other things, the union here seeks to go even beyond the developers on this project, and argue that the municipality within which the development occurs is the real entity controlling the construction. The facts, however, do not establish that it was the City which was the "real" force behind this subdivision project. Nor do they establish that the City had any meaningful role in the selection of Ro-von as a contractor such that the City in essence "engaged" Ro-von. We therefore do not find that the City has violated the subcontracting provision because of Ro-von's work on this subdivision.

Northern Fencing

111. With respect to the Northern Fencing grievance, the evidence before us is simply too insubstantial. We are unable to find from it that the City engaged a subcontractor to perform work covered by the collective agreement, since we have no evidence that the City actually contracted for the work in question, and there are no details as to the nature of the work performed except that on the day in question, one worker was attempting to connect a fence to a pole.

112. In conclusion, the grievances relating to Avery Construction, Mr. Sealer, Palmer Paving, Ro-von Construction and Northern Fencing are dismissed. The grievance relating to Double S Construction is allowed.

113. As indicated earlier, there are still a large number of grievances outstanding as part of this referral to grievance. To provide the parties with the opportunity to attempt to resolve these, this matter is hereby adjourned *sine die* for a period not exceeding one year. Unless within that

time either party requests that the Board proceed with the matter, it will be terminated. Either party may, in the absence of resolution of any or all of these grievances, request that this matter be re-listed for hearing. Upon receiving such a request, the Board will schedule a pre-hearing conference to attempt to resolve these grievances, or in absence of resolution of their merits, to attempt to fashion an expeditious manner of hearing them.

DECISION OF BOARD MEMBER F. B. REAUME; April 22, 1994

1. For the reasons given and my reasons which follow, I am in agreement with the majority decisions with regard to the Avery Construction, Mr. Sealer, Palmer Paving, Ro-Von Construction and Northern Fencing grievances.

2. I am not in agreement with the majority decision on the Double S Construction grievance, which takes the position that this work cannot be considered a prime contract "since it is not the type of contract which requires the further use of specialty contractors".

3. In my view, the prime contract stands on its own as the contract for the whole project whether or not any secondary contracts are let or need to be let by the prime contractor. I cannot agree that where a contract involves only one tier of contracting, it could be viewed as a sub-contract rather than a prime contract, nor do I find it appropriate to suggest that sub-contracting arises where an owner has a responsibility or an obligation to perform construction work.

4. It should be noted, that the first contract arbitration panel clearly cited two Board cases - namely, *The Municipality of Metropolitan Toronto* (1989), *supra*, and *Kapuskasing Board of Education* (1981), *supra*, which determine that sub-contracting clearly does not include the letting of a prime contract by an owner. In all of the grievances in question, the City was acting as an owner or not at all. A prime contract is a contract let for the complete performance of a project or job (i.e. a set of tasks which taken together result in the completion of the work required for an identifiable end product by an owner).

5. It is obvious that the determination of the arbitration panel knowingly did not give the Labourers union the right to restrict the City's right to contract work in its capacity as an owner. It did restrict the City's ability to sub-contract work when acting like a general contractor as suggested in the *Kapuskasing Board of Education* case, as referenced in paragraph 82 of the majority decision.

6. In my view therefore, where the City lets a contract that is clearly not for the complete performance of a project, then these contracts could be viewed as sub-contracts under this agreement. Neither the size of the project nor the type of work being done are of any value in determining the matter in question. This would apply equally where the City contracts directly with more than one contractor for the performance of a project or has its own employees do a portion of the project while contracting for any other portion of that project. In both cases it would be acting like a general contractor and (sub) contracting work.

7. In my view, the *Brant County Board of Education* (1986) case is not applicable in this context since the (C.U.P.E) collective agreement with the city's own employees permits contracting out provided no permanent employee who has completed four years of service will be laid off. In the case of the Labourers, there is no way this protection is applicable to their situation as they do not represent the City's employees.

8. It goes without saying that the Labourers were aware of this problem before their request for first contract arbitration. Having agreed with C.U.P.E. and the City to insert a clause

allowing the City to continue to utilize C.U.P.E. employees to perform this work without violating their collective agreement, in order to avoid a dispute over the certification with C.U.P.E., the Labourers then tried to restrict the City's ability to both contract and/or sub-contract work out to contractors not in contractual relations with the Labourer's union. They were not completely successful. There is no need to make them any more successful than envisioned by the arbitration panel.

9. I am concerned that this union has taken this approach to force those contractors who do this work for the City to sign up *exclusively* with the Labourers union. This would eliminate those contractors signed by other unions (i.e. operating engineers) or with no union affiliation. Such an approach gives no concern to the wishes of the employees of such contractors as provided by the Act, and avoids the normal certification procedure. It could also increase the City's costs.

10. In my view, the letting of a single contract by the City for a given project regardless of the size of the project or the number of contractors subsequently involved, constitutes a prime contract and not a sub-contract such as the Double S Construction project. I would therefore deny this grievance for the reasons given.

2820-93-R International Brotherhood of Electrical Workers, Local 636, Applicant v. The Hydro-Electric Commission of the City of Ottawa, Responding Party

Bargaining Unit - Combination of Bargaining Units - Practice and Procedure - Union seeking to combine "inside" unit and "works" unit of municipal hydro-electric commission - Board inviting employer to call its evidence first as to why application ought not to be granted - Board satisfied that combination order would reduce fragmentation and facilitate viable and stable collective bargaining without causing serious labour relations problems - Board directing that bargaining units be combined

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *Phillip G. Hunt* and *Peter Routliff* for the applicant; *Stephen Bird*, *J. A. Lunney*, *Lorne Rice* and *Norm Paquette* for the responding party.

DECISION OF THE BOARD; April 5, 1994

1. This is an application for a combination of bargaining units under section 7 of the *Labour Relations Act*.

2. The applicant union asks the Board to combine an "inside" unit consisting of approximately 190 employees, with a "works" unit consisting of approximately 100 employees. Both units are subject to collective agreements which will expire on March 31, 1995.

3. In light of the Board's decision in *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523 and the statutory preference for broader based bargaining, the Board invited the respondent employer to call its evidence first as to why the application ought not to be granted.

4. The employer sought to establish three propositions. First, that the factors underlying

(what it described as) the Board's "bigger is better" policy articulated in such decisions as *Mississauga Hydro*, *supra*, and *The Hudson's Bay Company*, [1993] OLRB Rep. Oct. 1042 were already present in the existing bargaining structure and, therefore, that a combination order was unnecessary to achieve these goals. Second, that a combination order would cause serious labour relations problems by rendering the smaller inside unit subject to the wishes of the larger outside unit (with which it does not share a community of interest), and by inhibiting the employer's ability to negotiate more flexible terms and conditions of employment in respect of the inside workers. Third, that the application was motivated by nothing more than a desire on the part of the trade union to increase its bargaining power.

5. In response, the union acknowledged that one of the purposes for bringing the application was to enhance its bargaining strength, but this was not the only purpose. The union called evidence to demonstrate that certain historical tensions have existed between the two bargaining units, and between the outside unit and the employer, which it believes are the product of separate collective bargaining. In the union's view, these tensions were at the heart of a recent 30 day strike between the outside unit and the employer during which members of the inside unit continued to work. Had the bargaining units been combined, the union believes, the strike could have been avoided.

6. On the basis of the evidence and submissions of the parties, the Board is satisfied that a combination order would reduce fragmentation and facilitate viable and stable collective bargaining without causing serious labour relations problems.

7. The reality is that at least since the most recent amendments to the *Labour Relations Act*, the statute and the Board favour broader based bargaining units whether at the initial certification stage or, subsequently, on a combination application. Exceptions are made where a more comprehensive unit would frustrate another important statutory objective - the ability to organize - and no serious labour relations problems would be caused by granting a smaller unit; where the broader unit would itself cause serious labour relations problems; and in the case of certain craft units. The reasons for this legislative and Board preference have been articulated in such cases as *The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85 and *Mississauga Hydro*, *supra*.

8. While it is true that the parties in this case have already achieved a substantial degree of similarity in the terms and conditions of employment between the two units and have made provision for such matters as inter-unit mobility, the Board is of the view that these matters can only be strengthened by combining the two units. In particular, the Board notes that as a result of the most recent round of collective bargaining, the two units now have different levels of benefits in their collective agreements. This is a situation which neither the employer or the trade union considers desirable, but which was a product of the bifurcated bargaining structure.

9. The Board is also of the view that combining the two units will help to lower the "artificial" barrier between the two units which, to some extent, may inhibit inter-unit mobility and which, from time to time, has contributed to animosity between the two units. A combination order will also lessen the likelihood of work stoppages by eliminating the possibility that the outside unit will feel compelled to reject as inadequate any agreement earlier reached by the inside unit. Combining the two units will also eliminate some duplication of effort and costs associated with separate collective bargaining for both parties.

10. More fundamentally, however, there is no evidence that combining the two units will cause serious labour relations problems. While it may be too much to say that the concerns of a minority unit can *never* be raised by an employer as the basis for resisting a combination order, the

Board notes that the trade union is under a statutory duty to represent all of its members fairly and there is no evidence of any “improper purpose” for bringing the application. A desire on the part of the trade union to increase its bargaining strength does not amount to such a purpose, nor does it qualify as a serious labour relations problem. As a factual matter, the Board also notes that a vote was held on the combination question, and a majority of the members of *both* units favoured the application.

11. Finally, the Board sees no merit in the employer’s concern that combining the two units will inhibit its ability to negotiate changes to the terms and conditions of employment affecting the “inside” workers. In the Board’s view, this is little more than a plea that the current weighting of collective bargaining forces be maintained. For the reasons already given, this argument too is rejected.

12. Accordingly, the Board directs that the two bargaining units be combined. The Board will remain seized to deal with any further remedial relief.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MARCH 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0224-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. 946695 Ontario Limited c.o.b. as Gus's Plumbing and Pump Service (Respondent)

Unit: "all plumbers and plumbers' apprentices and steamfitters and steamfitters' apprentices in the employ of 946695 Ontario Limited c.o.b. as Gus's Plumbing and Pump Service in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices and steamfitters and steamfitters' apprentices in the employ of 946695 Ontario Limited c.o.b. as Gus's Plumbing and Pump Service in all sectors of the construction industry in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

1396-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

Unit: "all employees of Grant Paving & Materials Limited in the Township of Dymond, save and except forepersons and persons above the rank of foreperson, persons regularly employed for not more than 24 hours per week, students employed during the school vacation period and engineers employed in their professional capacity" (40 employees in unit) (*Having regard to the agreement of the parties*)

1416-93-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Paragon Health Care (Ontario) Inc. (Respondent)

Unit: "all registered nurses of Paragon Health Care (Ontario) Inc. employed at Casa Verde Health Centre in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (8 employees in unit) (*Having regard to the agreement of the parties*)

1794-93-R: Labourers' International Union of North America, Local 607 (Applicant) v. Pierre Gagne Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of Pierre Gagne Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen, and persons above the rank of non-working foreman" (36 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

1981-93-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Corporation of the Town of Bothwell (Respondent)

Unit: "all employees of the Corporation of the Town of Bothwell in the Town of Bothwell, save and except Clerk-Treasurer and persons above the rank of Clerk-Treasurer" (4 employees in unit)

2079-93-R: International Brotherhood of Painters and Allied Trades - Local Union 1891 (Applicant) v. Marin Contracting Limited (Respondent)

Unit: “all painters and painters’ apprentices in the employ of Marin Contracting Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters’ apprentices in the employ of Marin Contracting Limited in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (3 employees in unit) (*Clarity Note*)

2406-93-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. Longo Brothers Fruit Markets Inc. (Respondent)

Unit: “all full-time meat department employees of Longo Brothers Fruit Markets Inc. in Burlington, Ontario, save and except manager and persons above the rank of manager” (8 employees in unit)

2555-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. General Signal Limited (Respondent)

Unit: “all employees of General Signal Limited working at or out of the City of Barrie, save and except supervisors, persons above the rank of supervisor and office and sales staff” (6 employees in unit)

2997-93-R: Communications, Energy, and Paperworkers Union of Canada (Applicant) v. Insulec Ltd. (Respondent) v. Group of Objecting Employees (Objectors)

Unit: “all employees of Insulec Ltd. at its Unipac Division located at 145 Edward Street in the Town of Aurora and at its Insulec Division located at 125 Edward Street in the Town of Aurora save and except Supervisors, persons above the rank of Supervisor, office, clerical and technical staff, Engineering and Sales Staff” (42 employees in unit)

3229-93-R: Teamsters, Chauffeurs, Warehousemen and Helpers Union, Local No. 880 (Applicant) v. Bothwell Area Sports Centre (Respondent)

Unit: “all employees of Bothwell Area Sports Centre in the Town of Bothwell, save and except Arena Manager, those above the rank of Arena Manager, persons working less than 24 hours per week and students working during the school vacation period” (3 employees in unit) (*Having regard to the agreement of the parties*)

3397-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-CANADA) (Applicant) v. Ex-Cell-O Canada Ltd. (Respondent)

Unit: “all employees of Ex-Cell-O Canada Ltd. in the City of Windsor, save and except supervisors, persons above the rank of supervisor, office and sales staff and students employed during the school vacation period” (158 employees in unit) (*Having regard to the agreement of the parties*)

3443-93-R: United Steelworkers of America (Applicant) v. Roy Ayranto Sales Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Roy Ayranto Sales Limited in the City of Sudbury, save and except supervisors and persons above the rank of supervisor.” (88 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3470-93-R: United Steelworkers of America (Applicant) v. CAA Northeastern Ontario Auto Club and Ontario Motor League Worldwide Travel (Sudbury) Inc. (Respondent)

Unit: “all employees of CAA Northeastern Ontario Auto Club and Ontario Motor League Worldwide Travel (Sudbury) Inc. in the Districts of Cochrane, Manitoulin, Nipissing, Parry Sound, Sudbury, Timiskaming and the Regional Municipality of Sudbury, save and except managers, persons above the rank of manager, Executive Secretary to the President and Administrator: Accounting and Compensation” (28 employees in unit) (*Having regard to the agreement of the parties*)

3485-93-R: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen. (Applicant) v. E W A Construction Ltd. (Respondent)

Unit: "all bricklayers and bricklayers apprentices, stonemasons and stonemasons apprentices in the employ of E W A Construction Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers apprentices, stonemasons and stonemasons apprentices in the employ of E W A Construction Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3555-93-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. Mar-Brite Foods Co-operative Inc. (Respondent)

Unit: "all employees of Mar-Brite Foods Co-operative Inc. in Leamington, save and except supervisors, persons above the rank of supervisors, office and clerical staff" (15 employees in unit)

3578-93-R: Labourers' International Union of North America Local 1059 (Applicant) v. City Centre Management Inc. (Respondent)

Unit: "all employees of City Centre Management Inc. at the City Centre, Tower A, 275 Dundas Street, London and Tower B, 380 Wellington Street, London, save and except supervisors, persons above the rank of supervisor, sales, clerical and office staff" (19 employees in unit)

3638-93-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, and The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (Applicant) v. Dynamic Steel Inc. (Respondent)

Unit: "all plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Dynamic Steel Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers, plumbers' apprentices and steamfitters and steamfitters' apprentices in the employ of Dynamic Steel Inc. in all sectors of the construction industry in the Regional Municipality of Hamilton-Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

3735-93-R: Ontario Nurses' Association (Applicant) v. Cambridge Memorial Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Cambridge Memorial Hospital in the City of Cambridge, save and except co-ordinators and unit (nursing) managers, persons above the rank of co-ordinator and unit (nursing) manager and persons for whom any trade union held bargaining rights as of January 31, 1994" (342 employees in unit)

3757-93-R: IWA-Canada, Local 2693 (Applicant) v. Andre Turcotte Trucking Limited (Respondent)

Unit: "all employees of Andre Turcotte Trucking Limited employed as truck and transport drivers at and out of the District of Thunder Bay, save and except foremen, persons above the rank of foremen" (6 employees in unit)

3762-93-R: International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicant) v. 575560 Ontario Ltd. (Respondent)

Unit: "all journeymen and apprentice bricklayers in the employ of 575560 Ontario Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journey-

men and apprentice bricklayers in the employ of 575560 Ontario Limited in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (10 employees in unit)

3779-93-R: Ontario Nurses’ Association (Applicant) v. Hamilton Program for Schizophrenia Inc. (Respondent)

Unit: “all employees of the Hamilton Program for Schizophrenia Inc. employed in the capacity of Case Manager, in the City of Hamilton, save and except the Business Administrator and persons above the rank of Business Administrator” (5 employees in unit) (*Clarity Note*)

3781-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: “all employees of Hallmark Housekeeping Services Inc. at 50 and 90 Burnhamthorpe Road West, in the City of Mississauga, commonly referred to as the Sussex Centre, save and except supervisors and persons above the rank of supervisor” (28 employees in unit) (*Having regard to the agreement of the parties*)

3793-93-R: Canadian Union of Public Employees (Applicant) v. The Oshawa and District Association for Community Living (Respondent)

Unit: “all employees of The Oshawa and District Association for Community Living in the Regional Municipality of Durham, save and except Managers, persons above the rank of Manager, Executive Secretary, Human Resources Administrative Assistant, Payroll Administrator, General Accountant, and persons in bargaining units for which any trade union held bargaining rights as of February 4, 1994,” (24 employees in unit) (*Having regard to the agreement of the parties*)

3802-93-R: Labourers’ International Union of North America, Local 1059 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: “all employees of Empire Maintenance Industries Inc. at White Oaks Mall, 1105 Wellington Road in the City of London, save and except forepersons and persons above the rank of foreperson” (2 employees in unit) (*Having regard to the agreement of the parties*)

3810-93-R: United Steelworkers of America (Applicant) v. Distinctive Designs Furniture Inc. (Respondent)

Unit: “all employees of Distinctive Designs Furniture Inc. in the City of Etobicoke, save and except forepersons and persons above the rank of forepersons, office, clerical and sales staff” (59 employees in unit) (*Having regard to the agreement of the parties*)

3854-93-R: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Oslo Construction (Respondent)

Unit: “all boilermakers and boilermaker apprentices in the employ of Oslo Construction in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all boilermakers and boilermaker apprentices in the employ of Oslo Construction in all sectors of the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

3869-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Meter Company Renovations (Respondent)

Unit: “all carpenters and carpenters’ apprentices in the employ of Meter Company Renovations in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters’ apprentices in the employ of Meter Company Renovations in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Town-

ships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

3872-93-R: Graphic Communications International Union, Local 517M, London (Applicant) v. Wright Lithographing Company Limited (Respondent)

Unit: “all employees of Wright Lithographing Company Limited in the City of London, save and except non-working foremen and persons above the rank of non-working foreman, office, clerical and sales staff, and employees in bargaining units for whom any trade union held bargaining rights as of February 9, 1994” (9 employees in unit) (*Having regard to the agreement of the parties*)

3890-93-R: Canadian Security Union (Applicant) v. Thunder Bay Security & Investigation Inc. (Respondent)

Unit: “all security guards in the employ of Thunder Bay Security & Investigation Inc. at 226 Syndicate Avenue South in the City of Thunder Bay, save and except supervisors and persons above the rank of supervisor” (2 employees in unit) (*Having regard to the agreement of the parties*)

3892-93-R: Service Employees International Union, Local 204 Affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. Charlotte Villa (Respondent)

Unit: “all employees of Charlotte Villa in the City of Brantford, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (30 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3895-93-R: United Steelworkers of America (Applicant) v. Coby’s Cookies Inc. (Respondent)

Unit: “all employees of Coby’s Cookies Inc. located at 48 Ashwarren Road in the Municipality of Metropolitan Toronto, save and except Managers, persons above the rank of Manager, salesmen, office and clerical staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

3928-93-R: Ontario Public Service Employees Union (Applicant) v. Alexandra Hospital (Respondent)

Unit: “all paramedical employees of the Alexandra Hospital in the Town of Ingersoll, save and except supervisors and persons above the rank of supervisor” (17 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3939-93-R: Labourers’ International Union of North America, Local 506 (Applicant) v. Catholic Cemeteries - Archdiocese of Toronto (Respondent)

Unit: “all employees of Catholic Cemeteries - Archdiocese of Toronto in the Town of Markham, save and except forepersons, persons above the rank of foreperson, students employed primarily as grasscutters during the school vacation periods, and office, clerical and sales staff” (14 employees in unit) (*Having regard to the agreement of the parties*)

3969-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Pine By Munro, Inc. (Respondent)

Unit: “all employees of Pine By Munro, Inc. in the Township of Innisfil, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff and persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (29 employees in unit) (*Having regard to the agreement of the parties*)

3986-93-R: Christian Labour Association of Canada (Applicant) v. Ambassador Building Maintenance Limited (Respondent)

Unit: “all employees of Ambassador Building Maintenance Limited in and out of Chatham, save and except supervisors, persons above the rank of supervisor and office staff” (26 employees in unit) (*Having regard to the agreement of the parties*)

3992-93-R: Service Employees International Union, Local 204 affiliated with the S.E.I.U., A.F. of L., C.I.O., C.L.C. (Applicant) v. The Salvation Army (Brantford Addictions and Rehabilitation Centre) (Respondent)

Unit: “all employees of The Salvation Army (Brantford Addictions and Rehabilitation Centre) at its Hostel and Industrial Operations in the County of Brant, save and except supervisors and persons above the rank of supervisor” (19 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

3994-93-R: Canadian Brotherhood of Railway, Transport and General Workers (Applicant) v. Harvey Krotz Limited (Respondent)

Unit: “all employees of Harvey Krotz Limited in the Town of Listowel, save and except forepersons, persons above the rank of foreperson, salespersons and office and clerical staff” (16 employees in unit) (*Having regard to the agreement of the parties*)

4026-93-R: Canadian Union of Professional Security Guards (Applicant) v. Wackenhut of Canada Limited (Respondent)

Unit: “all employees of Wackenhut of Canada Limited employed at 33 Charles Street East and 131 Bloor Street West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (7 employees in unit) (*Having regard to the agreement of the parties*)

4042-93-R: Canadian Security Union (Applicant) v. Wackenhut of Canada Limited (Respondent)

Unit: “all security guards in the employ of Wackenhut of Canada Limited in the Counties of Elgin and Middlesex, save and except supervisors and persons above the rank of supervisor” (35 employees in unit) (*Having regard to the agreement of the parties*)

4043-93-R: United Steelworkers of America (Applicant) v. Capital Supermarkets (1988) Limited (Respondent)

Unit: “all employees of Capital Supermarkets (1988) Limited in its LOEB Convent Glen store at 6509 Jeanne D’Arc Boulevard, Gloucester, save and except Grocery Manager, Service Manager, Meat Manager, Evening Store Manager, Night Crew Manager, Produce Manager, Fresh Food Manager, persons above those ranks, persons in bargaining units for which any trade union held bargaining rights as of February 22, 1994 and office and clerical staff” (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4095-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Hallmark Housekeeping Services Inc. (Respondent)

Unit: “all employees of Hallmark Housekeeping Services Inc. at 160 Bloor Street East in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (12 employees in unit) (*Having regard to the agreement of the parties*)

4098-93-R: United Steelworkers of America (Applicant) v. Corporation of the Town of Onaping Falls (Respondent)

Unit: “all employees of the Corporation of the Town of Onaping Falls in the Town of Onaping Falls, save and except Clerk/Administrator and Treasurer, persons above the rank of Clerk/Administrator and Treasurer, Road Superintendent, Director of Parks and Recreation, Administrative Assistant to the Clerk/Administrator, persons employed for not more than 24 hours per week and students employed during the school vacation period” (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4099-93-R: United Steelworkers of America (Applicant) v. Alcan Extrusions Division of Alcan Aluminum Limited (Respondent)

Unit: “all employees of Alcan Aluminum Limited at its Alcan Extrusions Division in the Town of Pickering, save and except Managers, persons above the rank of Manager, office, clerical, professional,

Project/Process/Development Technicians and sales staff” (68 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4105-93-R: Canadian Union of Public Employees, Local 79 (Applicant) v. The Board of Governors of the Riverdale Hospital (Respondent)

Unit: “all employees of The Board of Governors of the Riverdale Hospital in the Municipality of Metropolitan Toronto, regularly employed for not more than 24 hours per week as registered and graduate nurses employed in a nursing capacity, Physiotherapists, Occupational Therapists, Speech Language Pathologists and Dietitians, save and except Head Therapists, Assistant Director Food Services, Nurse Managers, persons above the rank of Nurse Manager and persons in bargaining units for which any trade union held bargaining rights as of February 28, 1994” (76 employees in unit) (*Having regard to the agreement of the parties*)

4120-93-R: Canadian Union of Public Employees (Applicant) v. Victorian Order of Nurses, Windsor-Essex County Branch (Respondent)

Unit: “all office and clerical employees of the Victorian Order of Nurses, Windsor-Essex County Branch, in the City of Windsor and the County of Essex, save and except supervisors, persons above the rank of supervisor and persons in bargaining units for which any trade union held bargaining rights as of March 1, 1994” (18 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4122-93-R: United Steelworkers of America (Applicant) v. 1029956 Ontario Inc. (Respondent)

Unit: “all employees of 1029956 Ontario Inc. at its LOEB Capital/Rideau store situated at 245 Rideau Street in the City of Ottawa, save and except Store Manager, persons above the rank of Store Manager, Grocery Manager, Produce Manager, Meat Manager, Service Manager, Office Manager and office and clerical staff” (108 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4129-93-R: Ontario Nurses’ Association (Applicant) v. Victorian Order of Nurses, Waterloo Region Branch (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity for the Victorian Order of Nurses, Waterloo Region Branch in the Regional Municipality of Waterloo, save and except supervisors, persons above the rank of supervisor and office and clerical staff” (79 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4131-93-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Ramco Installation Ltd. (Respondent)

Unit: “all electricians and electricians’ apprentices in the employ of Ramco Installation Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians’ apprentices in the employ of Ramco Installation Ltd. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

4133-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Kik Corporation (Respondent)

Unit #1: “all employees of Kik Corporation in the City of Vaughan, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (95 employees in unit) (*Having regard to the agreement of the parties*)

Unit #2: (see Applications for Certification Dismissed without vote)

4134-93-R: Labourers’ International Union of North America Local 1089 (Applicant) v. Reliable Home & Office Cleaning (Respondent)

Unit: “all employees of Reliable Home & Office Cleaning employed at Cabot Canada Ltd., Carbon Division,

in the City of Sarnia, save and except supervisor and persons above the rank of supervisor” (9 employees in unit) (*Having regard to the agreement of the parties*)

4146-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Cleaning Inc. engaged in cleaning at 439 University Avenue in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff” (7 employees in unit) (*Having regard to the agreement of the parties*)

4156-93-R: United Food and Commercial Workers International Union (Applicant) v. 795679 Ontario Limited c.o.b. as G.G.’s Foodmart (Respondent)

Unit: “all employees of 795679 Ontario Limited c.o.b. as G.G.’s Foodmart in the District of Manitoulin, save and except Store Manager and persons above the rank of Store Manager” (12 employees in unit) (*Having regard to the agreement of the parties*)

4170-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Aspen Ridge Homes Ltd. (Respondent)

Unit: “all construction labourers, in the employ of Aspen Ridge Homes Ltd. in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquensing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit)

4181-93-R: Teamsters Local Union 938 (Applicant) v. Ontario Bus Industries Inc. (Respondent)

Unit: “all employees of Ontario Bus Industries Inc. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, sales, office, clerical and technical staff, security guards, students employed in a co-operative education program and students employed during the school vacation period” (379 employees in unit)

4197-93-R: Labourers’ International Union of North America, Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: “all employees of Empire Maintenance Industries Inc. performing cleaning and or maintenance at the Bay, 176 Yonge Street, in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and clerical staff and persons employed out of the Responding Party’s Head Office” (20 employees in unit) (*Having regard to the agreement of the parties*)

4240-93-R: International Association of Machinists & Aerospace Workers (Applicant) v. Ontario Civil Service Credit Union Limited (Respondent)

Unit: “all employees of Ontario Civil Service Credit Union Limited at 24 Wellesley Street West in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor” (21 employees in unit) (*Having regard to the agreement of the parties*)

4244-93-R: United Steelworkers of America (Applicant) v. Benjamin Koyman Group Inc. (Respondent)

Unit: “all employees of Benjamin Koyman Group Inc. in the Municipality of Metropolitan Toronto, save and except Store Managers and persons above the rank of Store Manager” (11 employees in unit) (*Having regard to the agreement of the parties*)

4254-93-R: Labourers’ International Union of North America Local 1089 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Cleaning Inc. employed at Dow Chemical Canada Inc. 1425 Vidal Street South in the City of Sarnia, save and except forepersons/supervisors, persons above the rank of

foreperson/supervisor and office, clerical and sales staff” (26 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4282-93-R: Labourers’ International Union of North America Local 1089 (Applicant) v. 876764 Ontario Ltd. c.o.b. as Dale Enterprises (Respondent)

Unit: “all employees of 876764 Ontario Ltd. in its Dale Enterprises Division employed at Lambton College, 1457 London Road in the City of Sarnia, save and except non-working forepersons and persons above the rank of non-working foreperson” (16 employees in unit) (*Having regard to the agreement of the parties*)

4286-93-R: Labourers’ International Union of North America Local 1059 (Applicant) v. Krokus Bakery Inc. (Respondent)

Unit: “all employees of Krokus Bakery Inc. in the City of London, save and except Store Managers, persons above the rank of Store Manager and office, clerical and sales staff” (10 employees in unit) (*Having regard to the agreement of the parties*)

4298-93-R: International Ladies Garment Workers Union (Applicant) v. Iranian Community Association of Ontario (Respondent)

Unit: “all employees of Iranian Community Association of Ontario in the Municipality of Metropolitan Toronto, save and except Members of the Board of Directors” (13 employees in unit) (*Having regard to the agreement of the parties*)

4299-93-R: United Steelworkers of America (Applicant) v. Brampton, Mississauga and District Labour Action Centre (Respondent)

Unit: “all employees of Brampton, Mississauga and District Labour Action Centre in the City of Mississauga, save and except the Executive Director, persons above the rank of the Executive Director and Managing Co-ordinators” (5 employees in unit) (*Having regard to the agreement of the parties*)

4308-93-R: Labourers’ International Union of North America Local 1089 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: “all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance at Terra International (Canada) Inc. and I.C.I. at Moore-Sombra Townline Road in the Town of Courtright, save and except forepersons/supervisors, persons above the rank of foreperson/supervisor and office, clerical and sales staff” (8 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

2690-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. 601192 Ontario Ltd. c.o.b. as Simcoe Terrace (Respondent) v. Christian Labour Association of Canada (Intervener)

Unit: “all employees of 601192 Ontario Limited c.o.b. as Simcoe Terrace in the City of Barrie, save and except supervisors, persons above the rank of supervisor, and office and clerical staff” (34 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	40
Number of persons who cast ballots	32
Number of ballots marked in favour of applicant	24
Number of ballots marked in favour of intervener	8

2933-93-R: Canadian Union of Public Employees (Applicant) v. The Corporation of the City of Scarborough (Respondent) v. Ontario Nurses’ Association (Intervener)

Unit: “all employees of the Corporation of the City of Scarborough in the Scarborough Public Health Depart-

ment employed as Public Health, Registered and Graduate Nurses, save and except supervisors, those above the level of supervisor” (95 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	103
Number of persons who cast ballots	72
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	68
Number of ballots marked in favour of intervener	4

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

1968-93-R: International Union of Elevator Constructors Local No. 90 (Applicant) v. Windsor Elevator Service Inc. (Respondent) v. Construction Workers Local 53, CLAC (Intervener)

Unit: “all journeymen and apprentice elevator constructors of Windsor Elevator Service Inc., in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice elevator constructors of Windsor Elevator Service Inc., in all other sectors of the construction industry excluding the industrial, commercial and institutional sector of the construction industry, the Counties of Essex and Kent, the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman” (7 employees in unit)

Number of names of persons on revised voters’ list	4
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	4
Number of segregated ballots cast by persons whose names appear on voter’s list	1
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	1
Number of ballots segregated and not counted	1

3329-93-R: Laurentian University Faculty Association (Applicant) v. Laurentian University of Sudbury (Respondent)

Unit: “all part-time members of the faculty including part-time professional librarians employed by Laurentian University of Sudbury in the City of Sudbury, save and except administrators at or above the rank of Director, academic staff at or above the rank of Dean, Registrar, Special Assistant to the President, Manager of Employment and Staff Relations, Translators, Director of the Library, members of the Board of Governors and athletic coaches required as part of their duties to teach degree credit activity courses” (75 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters’ list	105
Number of persons who cast ballots	53
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	53
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	45
Number of ballots marked against applicant	6

Applications for Certification Dismissed Without Vote

3310-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

3319-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 642916 Ontario Limited c.o.b. as Swiss Chalet Restaurant (Respondent)

3323-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

3335-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. Cara Operations Limited (Respondent)

3339-91-R: The Canadian Union of Restaurant and Related Employees (Applicant) v. 596619 Ontario Limited (Respondent)

3662-93-R: Teamsters Local Union 938 (Applicant) v. Kenneth J. Gibson Enterprises Limited (Respondent)

3829-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Cancore Building Services Ltd. (Respondent)

4133-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Kik Corporation (Respondent)

Unit #1: (see Bargaining Agents Certified without vote)

Unit #2: "all employees of Kik Corporation in the City of Vaughan persons regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors and foremen, persons above the rank of supervisor and foreman, office and sales staff." (24 employees in unit) (*Having regard to the agreement of the parties*)

4178-93-R: United Steelworkers of America (Applicant) v. Ground Control (Sudbury) Ltd. (Respondent) v. Group of Employees (Objectors)

4199-93-R: Labourers' International Union of North America, Local 527 (Applicant) v. 648439 Ontario Inc. c.o.b. as Martin and Martin (Respondent)

4328-93-R: Teamsters Local Union 938 (Applicant) v. Knob Hill Farms Limited (Respondent) v. Group of Employees (Objectors)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0145-93-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Poirier Electric Limited (Respondent) v. Construction Workers Local 53, CLAC (Intervener)

Unit #1: "all electricians and electricians' apprentices in the employ of Poirier Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices in the employ of Poirier Electric Limited in all other sectors in the Counties of Essex and Kent, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots marked in favour of applicant	3
Number of ballots marked in favour of intervener	5

3798-93-R: Independent Canadian Steelworkers Union (Applicant) v. Atlas Specialty Steels, A Division of Sammi Atlas Inc. (Respondent) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Intervener)

Unit: "all employees of Atlas Specialty Steels, A Division of Sammi Atlas Inc., at its Atlas Specialty Steels Division employed in and about the company's manufacturing plant located at Welland, Ontario, Canada, but excluding all salaried employees, section leaders, maintenance supervisors, melters, and assistant rollers and rollers of the blooming and bar mills or any employee acting full-time in a supervisory or confidential capacity whether on salary or hourly pay, watchmen and members of the Plant Protection Department" (644 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	791
Number of persons who cast ballots	718

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	683
Number of segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	268
Number of ballots marked in favour of intervener	415
Number of ballots segregated and not counted	35

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

2149-93-R: Service Employees International Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. McDonald's Restaurants of Canada Limited and Ballantyne Foods Ltd. (Respondents) v. Group of Employees (Objectors)

Unit: "all employees of Ballantyne Foods Limited in the Town of Orangeville, in the County of Dufferin save and except assistant managers and persons above the rank of assistant manager" (102 employees in unit)

Number of names of persons on revised voters' list	102
Number of persons who cast ballots	98
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	96
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of applicant	19
Number of ballots marked against applicant	77
Number of ballots segregated and not counted	2

2705-93-R: Service Employees Union, Local 183 (Applicant) v. Ian Martin Limited (Respondent)

Unit: "all employees of Ian Martin Limited at Trenton Air Base in the Township of Sidney performing cleaning work, save and except supervisors and persons above the rank of supervisor" (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	2
Number of names of persons on revised voters' list	22
Number of persons who cast ballots	22
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	11

2901-93-R: Hospitality & Service Trades Union Local 261 (Applicant) v. 160572 Canada Inc. (c.o.b. as ALL-PARK Parking) (Respondent)

Unit: "all employees of 160572 Canada Inc. (c.o.b. as ALLPARK Parking) in the City of Ottawa, save and except supervisors/checkers, persons above the rank of supervisor/checker and office staff" (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	12
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	2

3684-93-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173 (Applicant) v. Arius Entertainment Ltd. c.o.b. as Central Parkway Dollar Cinemas and Skyline Dollar Cinemas (Respondent)

Unit: "all motion picture machine operators employed by Arius Entertainment Ltd. c.o.b as Central Parkway Dollar Cinemas and Skyline Dollar Cinemas in the City of Mississauga and in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (2 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	1

Applications for Certification Withdrawn

0923-91-R: Labourers' International Union of North America, Local 527 (Applicant) v. Tarcon Ltd. (Respondent) v. International Union of Operating Engineers, Local 793 (Intervener) v. Group of Employees (Objectors)

1397-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

1519-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. Grant Paving & Materials Limited (Respondent)

3663-93-R: United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. Summit View Homes (Respondent)

3668-93-R: Millwright & Machine Erectors, Local 2309, United Brotherhood of Carpenters and Joiners of America (Applicant) v. A & B Watling Industrial Services Inc. (Respondent)

3763-93-R: International Alliance of Theatrical Stage Employees, Local 471 (Applicant) v. Corporation of the City of Nepean (Respondent)

3900-93-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Corporation of the Township of Terrace Bay (Respondent)

3903-93-R: United Steelworkers of America (Applicant) v. Metropolitan Toronto Convention Centre Corporation (Respondent) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351A (Intervener)

3946-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

3961-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent) v. Canadian Union of Professional Security Guards (Intervener)

3987-93-R: United Food & Commercial Workers International Union, Local 175 (Applicant) v. Thunder Bay Security & Investigations Inc. (Respondent) v. Canadian Security Union (Intervener)

4056-93-R: Ontario Public Service Employees Union (Applicant) v. Rotary (Don Valley) Cheshire Homes Inc. (Respondent)

4059-93-R: Canadian Union of Public Employees (Applicant) v. YMCA of Greater Toronto (Respondent)

4080-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

4155-93-R: Teamsters Local Union 938 (Applicant) v. Ontario Bus Industries Inc. (Respondent)

4164-93-R; 4165-93-R; 4166-93-R; 4167-93-R; 4168-93-R: United Steelworkers of America (Applicant) v. 913719 Ontario Ltd. c.o.b. as Adults Only Video (Respondent)

4191-93-R: United Food and Commercial Workers International Union (Applicant) v. 241 Pizza Ontario Ltd. (Respondent)

4215-93-R: Teamsters Local Union No. 230, Ready-Mix, Building Supply, Hydro & Construction Drivers, Warehousemen and Helpers (Applicant) v. Centura Floor & Wall (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

4096-93-R: Pine by Munro Inc. (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1646-89-R: Ontario Provincial Conference, International Union of Bricklayers and Allied Craftsmen, and International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicants) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Withdrawn*)

1691-89-R: United Brotherhood of Carpenters & Joiners of America, Local Union 2222 (Applicant) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Withdrawn*)

0034-93-R: Iron Workers District Council of Ontario and the International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Mohawk Services, Creative Air Systems Ltd. (Respondents) (*Withdrawn*)

1320-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Minho Masonry Ltd. and M.S. Contracting Ltd. (Respondents) (*Granted*)

1720-93-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. C & D Limited, Peter's Panels Ltd. (Respondents) (*Granted*)

2148-93-R: Service Employees International Union, Local 204 Affiliated with the A.F. of L., C.I.O., C.L.C (Applicant) v. McDonald's Restaurants of Canada Limited and Ballantyne Foods Ltd. (Respondents) (*Withdrawn*)

3059-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. W.A. Stephenson Construction Co. Limited and W.A. Stephenson Construction Managers Inc. (Respondent) (*Granted*)

3303-93-R: International Union of Bricklayers and Allied Craftsmen, Local 6, Windsor (Applicant) v. Masotti Construction Company Incorporated and Masotti Construction Company Limited and Generation Development Contractors Inc. (Respondents) (*Withdrawn*)

3417-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. New House Investments Limited, Country Homes (King) Limited, 755256 Ontario Limited (Respondents) (*Withdrawn*)

3468-93-R: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. J.S. Electric (1989) Ltd., J.S. Industrial Sales & Service Ltd., J.S Industrial Sales & Service (1993) Inc. (Respondents) (*Granted*)

3546-93-R: Labourers' International Union of North America, Local 527 (Applicant) v. Pisapia Inc., Pisapia Construction Co. Ltd. and Pisapia (Canada) Limited (Respondent) (*Withdrawn*)

3553-93-R: Graphic Communications International Union, Local 500M (Applicant) v. The Hurley Printing Company Inc., 1044436 Ontario Inc. (Respondents) (*Withdrawn*)

4159-93-R: Labourers' International Union of North America, on its own behalf and on behalf of Labourers' International Union of North America, Local Unions 491, 493 and 607 (Applicant) v. Litz Equipment Ltd., R. Litz and Sons Company Limited and/or Russell Litz & Sons Company Limited (Respondents) (*Withdrawn*)

4390-93-R: IWA - Canada, Local 2693 (Applicant) v. Andre Turcotte Trucking Limited, R. Turcotte & Sons Trucking Limited and R. Turcotte Trucking Limited (Respondents) (*Withdrawn*)

SALE OF A BUSINESS

0034-93-R: Iron Workers District Council of Ontario and the International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Mohawk Services, Creative Air Systems Ltd. (Respondents) (*Withdrawn*)

1320-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers & Allied Craftsmen (Applicant) v. Minho Masonry Ltd. and M.S. Contracting Ltd. (Respondents) (*Granted*)

1720-93-R: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. C & D Limited, Peter's Panels Ltd. (Respondents) (*Granted*)

3059-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America and Drywall Acoustic Lathing and Insulation Local 675 United Brotherhood of Carpenters and Joiners of America (Applicant) v. W.A. Stephenson Construction Co. Limited and W.A. Stephenson Construction Managers Inc. (Respondent) (*Granted*)

3303-93-R: International Union of Bricklayers and Allied Craftsmen, Local 6, Windsor (Applicant) v. Masotti Construction Company Incorporated and Masotti Construction Company Limited and Generation Development Contractors Inc. (Respondents) (*Withdrawn*)

3417-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. New House Investments Limited, Country Homes (King) Limited, 755256 Ontario Limited (Respondents) (*Withdrawn*)

3468-93-R: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. J.S. Electric (1989) Ltd., J.S. Industrial Sales & Service Ltd., J.S Industrial Sales & Service (1993) Inc. (Respondents) (*Granted*)

3546-93-R: Labourers' International Union of North America, Local 527 (Applicant) v. Pisapia Inc., Pisapia Construction Co. Ltd. and Pisapia (Canada) Limited (Respondent) (*Withdrawn*)

3553-93-R: Graphic Communications International Union, Local 500M (Applicant) v. The Hurley Printing Company Inc., 1044436 Ontario Inc. (Respondents) (*Withdrawn*)

3579-93-R: The Corporation of the Township of Oro-Medonte (Applicant) v. The Canadian Union of Public Employees and its Local 3640 (Respondent) (*Granted*)

3743-93-R; 3783-93-R: Canadian Union of Public Employees (Applicant) v. Ontario Natural Resources Safety Association (Respondent); Ontario Natural Resources Safety Association (Applicant) v. Canadian Union of Public Employees (Respondent) (*Dismissed*)

3772-93-R: Teamsters, Chemical, Energy and Allied Workers Local 1849 (Applicant) v. Cartier Wines & Beverages Corp., a division of Cartier & Inniskillin Vintners Inc. and T.G. Bright & Co., Limited and Teamsters, Chemical, Energy and Allied Workers Division Local 1655 (Respondents) (*Withdrawn*)

3922-93-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Deloitte & Touche Inc., as Trustee in bankruptcy and as receiver and manager of 836499 Ontario Limited o/a The Talisman Hotel, without personal liability (Respondent) (*Withdrawn*)

4159-93-R: Labourers' International Union of North America, on its own behalf and on behalf of Labourers' International Union of North America, Local Unions 491, 493 and 607 (Applicant) v. Litz Equipment Ltd., R. Litz and Sons Company Limited and/or Russell Litz & Sons Company Limited (Respondents) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

2239-93-R: Michael McDougall (Applicant) v. Hotel Employees, Restaurant Employees Union Local 75 (Respondent) (*Dismissed*)

3369-93-R: Employees of Centre Pre-Scolaire Aladin Inc. (Applicant) v. Canadian Union of Public Employees, Local 2204 (Respondent) v. Centre Pre-Scolaire Aladin Inc. (Intervener)

Unit: "all employees of Centre Pre-Scolaire Aladin Inc. in the Regional Municipality of Ottawa-Carleton, save and except the Executive Director and persons above the rank of the Executive Director" (12 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of ballots marked in favour of respondent	3
Number of ballots marked against respondent	7

3403-93-R: Jack Mclean, on his own behalf and on behalf of a group of employees of Coiltech, A Division of ABB Flakt Ltd. (Applicant) v. Sheet Metal Workers International Association, Local Union 47 (Respondent) v. Asea Brown Boveri Inc. (Intervener)

Unit: "all employees of Asea Brown Boveri Inc. in the Town of Smiths Falls, save and except foremen, persons above the rank of foreman, office and sales staff" (7 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	10
Number of persons who cast ballots	7
Number of spoiled ballots	1
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	6

3404-93-R: Todd Burse (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. 371487 Ontario Ltd. o/a Bofinger Restaurant (Intervener)

Unit: “all employees of Oliver’s Brasserie Bofinger at 1507 Yonge Street in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, Head Chef, Sous Chef, office and clerical staff” (48 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	50
Number of persons who cast ballots	36
Number of ballots marked in favour of respondent	10
Number of ballots marked against respondent	26

3441-93-R: Atlantic Packaging Products Limited Newsprint and Tissue Division, Whitby Power House Engineers (Stationary Engineers) (Applicant) v. International Union of Operating Engineers, Local 796 (Respondent) v. Atlantic Packaging Products Ltd. (Intervener)

Unit: “all Stationary Engineers and persons primarily engaged as their helpers employed by Atlantic Packaging Products Ltd. in its Power House at its Newsprint and Tissue Division in Whitby, save and except Chief Engineer and persons above the rank of Chief Engineer” (5 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	5
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	4

3500-93-R: Larry W. Rafferty (Applicant) v. United Steelworkers of America (Respondent) v. Tycos Tool & Die, a division of Conix Canada Inc. (Intervener)

Unit: “all employees of Tycos Tool and Die in the City of Vaughan, save and except supervisors, those above the rank of supervisor, office, clerical and sales staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period” (110 employees in unit) (*Clarity Note*) (*Granted*)

Number of names of persons on revised voters’ list	113
Number of persons who cast ballots	111
Number of ballots marked in favour of respondent	35
Number of ballots marked against respondent	76

3868-93-R: Pam Griffore, Cindy Lucier (Applicants) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. Venture Industries Canada Ltd. (Intervener) (*Granted*)

4173-93-R: William Joseph Mills et al (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880 (Respondent) v. Network Transport Limited (Intervener) (*Withdrawn*)

REFERRAL FROM MINISTER (SECTION 109)

3847-93-M: United Steelworkers of America, Local 6946 (Applicant) v. Hovey Manufacturing (Canada) Inc. (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL LOCKOUT (INDUSTRIAL)

2339-92-U: Canadian Stagehands Association [“CSA”] (Applicant) v. The Corporation of the City of Ottawa [“the City”] and Bass Clef (Respondents) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 471 [“IATSE”] (Intervener) (*Dismissed*)

2338-92-U: Canadian Stagehands Association [“CSA”] (Applicant) v. Corporation of the City of Ottawa [“the City”] and Bass Clef (Respondents) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 471 [“IATSE”] (Intervener) (*Dismissed*)

2345-92-U: Canadian Stagehands Association (Applicant) v. The Corporation of the City Ottawa and MCA Concerts Canada (Respondents) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 471 (Intervener) (*Dismissed*)

2344-92-U: Canadian Stagehands Association (Applicant) v. The Corporation of the City Ottawa and MCA Concerts Canada (Respondents) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 471 (Intervener) (*Dismissed*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

4137-93-M: Ontario Public Service Employees’ Union (Applicant) v. Modern Building Cleaning Inc. (Respondent) (*Withdrawn*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1262-91-U; 1263-91-U: Labourers International Union of North America, Local 527 (Applicant) v. Tarcon Ltd. (Respondent); International Union of Operating Engineers, Local 793 (Applicant) v. Tarcon Ltd. (Respondent) (*Withdrawn*)

3215-91-U: Ivan Gudelj (Applicant) v. “GMP” - Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO-CLC Local 64, Canron Inc. (Respondents) (*Dismissed*)

2340-92-U: Canadian Stagehands Association (Applicant) v. The Corporation of the City of Ottawa (Respondent) v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States And Canada, Local 471 (Intervener) (*Dismissed*)

2449-92-U: Chuk Odiah (Applicant) v. Lakehead University Faculty Association (Respondent) v. Lakehead University (Intervener) (*Dismissed*)

3608-92-U: Labourers’ International Union of North America, Local 1059 (Applicant) v. Liberty Building Services, City Centre Management Inc. (Respondents) (*Withdrawn*)

0306-93-U: Francee Scott and Sandra Shannon (Applicant) v. C.U.P.E. Local 1323 (Respondent) v. The Corporation of the Town of Georgina (Intervener) (*Withdrawn*)

0405-93-U: Randy Wiltse (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) v. A. G. Simpson Co. Limited (Intervener) (*Dismissed*)

0462-93-U: Robert Moore, Member Loc. 353 (Applicant) v. Larry Priestman and Trustees, Local 353 (Respondent) (*Dismissed*)

0717-93-U: Scott Speck (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Respondent) (*Withdrawn*)

0949-93-U: Canadian Union of Public Employees, Local 79 (Applicant) v. The Municipality of Metropolitan Toronto (Respondent) (*Withdrawn*)

1290-93-U: Jill Louise Bettles, Member of C.A.W. Local 673 (Applicant) v. The National Automobile Aerospace and Agricultural Implement Workers of Canada Local 673 and its Officer Bill Mackie, Boeing of Canada Ltd./DeHavilland Division, DeHavilland Bombardier (Respondents) (*Withdrawn*)

1610-93-U: Wally Pudlak (Applicant) v. Canadian Union of Public Employees, Local 2345, Windsor Community Living Support Services (Respondents) (*Dismissed*)

1738-93-U: Retail, Wholesale and Department Store Union A.F.L. - C.I.O. - C.L.C. (Applicant) v. Northern Uniform Services Corp. (Respondent) (*Withdrawn*)

1858-93-U: Russell Rak (Applicant) v. John Caines, Chairperson General Motors of Canada Limited Shop Committee Local 222, C.A.W. (Respondent) v. General Motors of Canada, (Intervener) (*Dismissed*)

1943-93-U: United Plant Guard Workers of America, Local 1956 (Applicant) v. Scott D. Avery (Company) Limited (Respondent) (*Withdrawn*)

2243-93-U: IWA - Canada (Applicant) v. Madawaska Hardwood Flooring Inc. (Respondent) (*Withdrawn*)

2357-93-U: Canadian Stagehands Association (Applicant) v. International Alliance of Theatrical Stage Employees, Local 471 and MCA Concerts Canada and Central Canadian Exhibition Association and Corporation of the City of Ottawa (Respondents) (*Dismissed*)

2704-93-U: Labourers' International Union of North America, Ontario Provincial District Council and its affiliated Local Unions 1059 & 1081 (Applicant) v. Pickard Construction (1991) (Respondent) (*Granted*)

2776-93-U: International Association of Machinists and Aerospace Workers (Applicant) v. Premark Canada Inc. (Respondent) (*Withdrawn*)

3011-93-U: Robert Gilvear (Applicant) v. Canadian Union of Public Employees, Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener) (*Withdrawn*)

3149-93-U: John Brent Page (Applicant) v. United Steelworkers of America Local 6500 (Respondent) (*Withdrawn*)

3299-93-U: Jackie Wood, Heather Wylie, Jennifer Devolpi, H. Ong, Ron Ryan, John Braun, Tammy Currie and Karen Villeneuve (Applicants) v. Textile Processors, Service Trades, Health Care, Professional & Technical Employees International Union, Local 351 (Respondent) (*Withdrawn*)

3300-93-U: Yiu Kwong (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75 (Respondent) v. Toronto Hilton Hotel (Intervener) (*Withdrawn*)

3308-93-U: Eugene Kalwa (Applicant) v. Ontario Hydro (Respondent) (*Dismissed*)

3321-93-U: John Demetriades (Applicant) v. St. Joseph's Health Centre (Respondent) (*Dismissed*)

3326-93-U: Richard Lloyd Harris (Applicant) v. Local 7519-04 United Steelworkers of America AFL-CIO-CLC (Respondent) (*Withdrawn*)

3339-93-U: IWA-Canada, Paul Wilkinson, Dennis Taylor, Robert Cripps, Blake Rhuebottom and Thomas Hogan (Applicants) v. Canusa, a Division of Shaw Industries Ltd. (Respondent) (*Withdrawn*)

3373-93-U: Ontario Public Service Employees Union (Applicant) v. Pioneer Youth Services (Toronto) Inc. (Respondent) (*Withdrawn*)

3386-93-U: Maureen Drew (Applicant) v. Service Employees' Union, Local 210 (Respondent) (*Withdrawn*)

3422-93-U: Mahomed Burkutally (Applicant) v. Laundry and Linen Drivers and Industrial Workers Union, Teamsters Local 847 (Respondent) v. Model Uniform Rental Services Ltd. (Intervener) (*Withdrawn*)

3451-93-U: United Steelworkers of America (Applicant) v. 913719 Ontario Limited c.o.b. as Adults Only Video (Respondent) (*Withdrawn*)

3459-93-U: Mark A. Hommersen (Applicant) v. United Food & Commercial Workers International Union, Local 175 (Respondent) v. Miracle Ultra Mart - Store 408 (Intervener) (*Dismissed*)

3461-93-U: Association of Canadian Film Craftspeople (Applicant) v. Charles Street Video and Performing Arts Society, Susan Rynard, Steve Reinke, Steve Forsyth, Phil Strong, Gary Cook, Jodi Franklin, Paulette Philips, Barr Gilmore, Ed Bianchi, Jane Thompson and Tess Payne (Respondents) (*Terminated*)

3486-93-U: Hans D. Foerster (Applicant) v. Communications, Energy & Paperworkers Union of Canada, CEP Local 599-0 (Respondent) (*Withdrawn*)

3516-93-U: Fibracan, A Division of Innopac Inc. (Applicant) v. Teamsters Local Union 938, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Respondent) (*Withdrawn*)

3520-93-U: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508 (Applicant) v. Gerger Mechanical Ltd. (Respondent) (*Withdrawn*)

3538-93-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Walnut Building and Investment Limited (Respondent) (*Withdrawn*)

3554-93-U; 4012-93-U: Graphic Communications International Union, Local 500M (Applicant) v. The Hurley Printing Company Inc., 1044436 Ontario Inc. (Respondents) (*Withdrawn*)

3598-93-U: Ken Howard (Applicant) v. CAW-Canada and CAW-Canada Local 80 (Respondent) (*Withdrawn*)

3633-93-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Beutel, Goodman & Company Ltd. c.o.b. 547495 Ontario Limited and City Centre Management Inc. and Burns International Security Services Ltd. (Respondents) (*Withdrawn*)

3656-93-U: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. Regal Constellation Hotel Ltd. (Respondent) (*Withdrawn*)

3685-93-U: Ontario Public Service Employees Union (Applicant) v. Rotary (Don Valley) Cheshire Homes Inc. (Respondent) (*Granted*)

3696-93-U: Michael Aitken (Applicant) v. The United Food and Commercial Workers, Local 1000A (Respondent) v. National Grocers Co. Ltd. (Intervener) (*Withdrawn*)

3725-93-U: Brad Yaciuk (Applicant) v. Amalgamated Clothing and Textile Workers Union, Local 14J (Respondent) v. Xerox Canada Ltd. (Intervener) (*Withdrawn*)

3726-93-U: William H. Huson (Applicant) v. Torino Drywall Systems and International Brotherhood of Painters and Allied Trades, Local Union 1891 (Respondents) (*Withdrawn*)

3774-93-U: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173 (Applicant) v. Arius Entertainment Ltd. c.o.b. as Central Parkway Dollar Cinemas and Skyline Dollar Cinemas (Respondents) (*Withdrawn*)

3776-93-U: Stephen W. Orser (as represented by Workers' Advocate/Agent, Barry A. Wells) (Applicant) v. Perry Ferguson/Dave Garnham; 947465 Ontario Limited c.o.b. as Checker Limousine & Airport Service (Respondent) (*Withdrawn*)

3795-93-U: Canadian Union of Public Employees Local 3718 (Applicant) v. Global Recycling Industries Inc. (Respondent) (*Withdrawn*)

3809-93-U: United Steelworkers of America (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent) (*Granted*)

3842-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 636 (Applicant) v. Canada Stampings and Dies Limited (Respondent) (*Granted*)

3853-93-U: The International Association of Machinists and Aerospace Workers Local 905 (Applicant) v. Dowty Aerospace Landing Gear (Respondent) (*Withdrawn*)

3860-93-U: Teddy Michael Krzysztofczyk (Applicant) v. Communication, Energy and Paperworkers Union (Local 132) (Respondent) (*Withdrawn*)

3921-93-U: Hospitality & Service Trades Union, Local 261 (Applicant) v. Deloitte & Touche Inc., as Trustee in bankruptcy and as receiver and manager of 836499 Ontario Limited o/a The Talisman Hotel, without personal liability (Respondent) (*Withdrawn*)

3965-93-U: Canadian Union of Public Employees and its Local 3732 (Applicant) v. The Regional Municipality of Halton (Respondent) (*Withdrawn*)

3966-93-U: Greg Dixon (Applicant) v. Terry Spark of Greyhound Lines Canada & Greyhound Lines of Canada (Respondents) (*Withdrawn*)

3967-93-U: Greg Dixon (Applicant) v. Amalgamated Transit Union (Local 113) (Respondent) (*Withdrawn*)

3972-93-U: Michael C. Harrison (Applicant) v. United Steelworkers of America Local Union 6049 (Respondent) (*Withdrawn*)

3981-93-U: United Food and Commercial Workers International Union (Applicant) v. Enterprise Property Group Limited (Respondent) (*Withdrawn*)

3988-93-U: Gary Cyr (Applicant) v. United Steelworkers of America Local 6547 (Respondent) v. Hill Refrigeration (Intervener) (*Withdrawn*)

3989-93-U: Daniel D. Walton (Applicant) v. Liffey Custom Coatings Inc. (Respondent) (*Withdrawn*)

4007-93-U: Teamsters Local 880 (Applicant) v. Commonwealth Hospitality Ltd. c.o.b. Ramada Inn, Windsor (Respondent) (*Withdrawn*)

4011-93-U: Angela Catanzaro (Applicant) v. Manchester Plastics G.S. Woolley Div. (Respondent) v. CAW Local 303 (Intervener) (*Withdrawn*)

4037-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Custom Racks Ltd. (Respondent) (*Withdrawn*)

4048-93-U: George Thomas Simpson (Applicant) v. Liquor Control Board of Ontario (Respondent) v. Ontario Liquor Board Employees' Union (Intervener) (*Withdrawn*)

4051-93-U; 4109-93-U: United Food & Commercial Workers International Union AFL, CIO, CLC (Applicant) v. Brantford Packers Limited (Respondent) (*Withdrawn*)

4066-93-U: Michael Brook (Applicant) v. Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC and its Local 1606 and Amoco Fabrics and Fibers Ltd., Brantford Mills (Respondents) (*Withdrawn*)

4087-93-U: Retail, Wholesale and Department Store Union District Council of the United Food & Commercial Workers International Union (Applicant) v. Northern Uniform Services Corp. (Respondent) (*Withdrawn*)

4097-93-U: Michael Arsenault (Applicant) v. The Canada Council of Teamsters, Local 938 (Respondent) (*Withdrawn*)

4160-93-U: United Food and Commercial Workers International Union Locals 175 and 633 (Applicant) v. Art Parliament Foods Ltd., carrying on business as Foxboro I.G.A. (Respondent) (*Withdrawn*)

4162-93-U: United Food and Commercial Workers International Union, Locals 175 and 633 (Applicant) v. LOEB Pembroke, 995584 Ontario c.o.b. as LOEB Club Plus Pembroke (Respondent) (*Withdrawn*)

4186-93-U: Efren L. Castillo (Applicant) v. Service Employees International Union (Respondent) (*Withdrawn*)

4210-93-U: Communications, Energy and Paperworkers Union, Local 92 (Applicant) v. Boise Cascade Canada Limited (Respondent) (*Withdrawn*)

4216-93-U: James K. Hepburn (Applicant) v. Essrock Ready Mix Producers (Respondent) (*Dismissed*)

4258-93-U: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Ramco Installation Ltd., A.D.M. Agri-Industries Limited (Respondents) (*Withdrawn*)

4265-93-U: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., A Division of Royplast Limited (Respondent) (*Withdrawn*)

4301-93-U: Labourers' International Union of North America, Local 183 (Applicant) v. Aspen Ridge Homes Ltd. (Respondent) (*Withdrawn*)

4303-93-U: United Food and Commercial Workers International Union, Local Unions 175 and 633 (Applicant) v. Longo Brothers Fruit Markets Inc. (Respondent) (*Withdrawn*)

4459-93-U: United Steelworkers of America (Applicant) v. Greenhills Corporation (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

3608-93-M: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647 (Applicant) v. William Neilson Ltd. (Respondent) (*Dismissed*)

3773-93-M: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, Local 173 (Applicant) v. Arius Entertainment Ltd. c.o.b. as Central Parkway Dollar Cinemas and Skyline Dollar Cinemas (Respondents) (*Withdrawn*)

3980-93-M: United Food and Commercial Workers International Union (Applicant) v. Enterprise Property Group (Respondent) (*Withdrawn*)

4110-93-M: United Food and Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Brantford Packers Limited (Respondent) (*Withdrawn*)

4211-93-M: International Union of Bricklayers and Allied Craftsmen, Local 25, Ontario (Applicant) v. General Masonry Company Inc. (Respondent) (*Granted*)

4257-93-M: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Ramco Installation Ltd., A.D.M. Agri-Industries Limited (Respondents) (*Withdrawn*)

4266-93-M: United Steelworkers of America (Applicant) v. Royalguard Vinyl Co., a division of Royplast Limited (Respondent) (*Granted*)

4267-93-M: International Brotherhood of Electrical Workers (Applicant) v. Groff & Associates Ltd. (Respondent) (*Granted*)

4302-93-M: United Food and Commercial Workers International Union, Local Unions 175 and 633 (Applicant) v. Longo Brothers Fruit Markets Inc. (Respondent) (*Withdrawn*)

4304-93-M: The United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Antonio Sorbera Partitions (Respondent) (*Withdrawn*)

4317-93-M: Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and Local 12 of the International Union of Bricklayers and Allied Craftsmen (Applicants) v. 575560 Ontario Ltd. c.o.b. as H.A. Dickison Contracting Limited (Respondent) (*Withdrawn*)

4385-93-M: United Food and Commercial Workers International Union, Locals 175 and 633 (Applicant) v. K & Son Maintenance (Respondent) (*Withdrawn*)

4388-93-M: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW (Applicant) v. Injectech Industries Inc. c.o.b. as Walter Industries (Respondent) (*Granted*)

4458-93-M: United Steelworkers of America (Applicant) v. Greenhills Corporation (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

3775-93-M: The Textile Rental Institute of Ontario (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

4295-93-M: Canadian Linen Supply Co. Ltd. (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

1465-88-JD: Labourers' International Union of North America, Local 183 (Applicant) v. Dufferin Construction Company, a Division of St. Lawrence Cement Inc., United Brotherhood of Carpenters and Joiners of America, Local 27, Airport Development Corporation, The Heavy Construction Association of Toronto (Respondents) (*Granted*)

2189-88-JD: Labourers' International Union of North America, Local 183 (Applicant) v. Armbr Materials and Construction Limited, United Brotherhood of Carpenters and Joiners of America, Local 27 (Respondents) (*Granted*)

3433-92-JD: The Board of Health for the Peterborough County- City Health Unit (Applicant) v. The Association of Allied Health Professionals: Ontario, Ontario Nurses' Association (Respondents) (*Granted*)

3272-93-JD: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association, Local 397 (Applicant) v. Lakehead Roofing and Sheet Metal Co. (1983) Ltd., United Brotherhood of Carpenters & Joiners of America, Local 1669 (Respondents) (*Granted*)

3372-93-JD: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association, Local 562 (Applicant) v. Process Industrial Company Inc., c.o.b. as Process Mechanical Installations and/or P.M.I., International Association of Bridge, Structural and Ornamental Iron Workers', Local 736 (Respondents) (*Withdrawn*)

3943-93-JD: Electrical Power Systems Construction Association and, Ontario Hydro (Applicants) v. Interna-

tional Brotherhood of Electrical Workers, Local Union 788 and, Power Workers' Union, CUPE Local 1000 (Respondents) (*Withdrawn*)

3997-93-JD: Ontario Public Service Employees Union (Applicant) v. Northwestern General Hospital (Respondent) (*Dismissed*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2641-93-M: Toronto Star Newspapers Limited (Applicant) v. The Southern Ontario Newspaper Guild, Local 87 of the Newspaper Guild (Respondent) (*Withdrawn*)

2968-93-M: Canadian Union of Public Employees and its Local 3426 (Applicant) v. Geraldton District Association for Community Living (Respondent) (*Terminated*)

3263-93-M: The Nipissing District Roman Catholic School Board (Applicant) v. Office and Professional Employees International Union Local 529 (Respondent) (*Withdrawn*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2091-92-OH: Ivan Gudelj (Applicant) v. Canron Inc. (Respondent) (*Dismissed*)

3364-93-OH: Pierre Barcik (Applicant) v. Lowndes Lambert Group Canada Limited (Respondent) (*Withdrawn*)

3715-93-OH: Angie Diana (Applicant) v. Windsor Western Hospital Centre Inc. (Respondent) (*Withdrawn*)

3745-93-OH: Satia Rajah (Applicant) v. Delta Chelsea Inn Hotel (Respondent) (*Withdrawn*)

3794-93-OH: Canadian Union of Public Employees Local 3718 (Applicant) v. Global Recycling Industries Inc. (Respondent) (*Withdrawn*)

3826-93-OH: Richard Warren (Applicant) v. Taymor Industries Limited (Respondent) (*Granted*)

3852-93-OH: Joe Marusic (Applicant) v. Bolton Steel Tube Co. Ltd. (Respondent) (*Withdrawn*)

3953-93-OH: Antonio G. Zanutto (Applicant) v. Francois Levesque owner F & T Roofing (Respondent) (*Withdrawn*)

4104-93-OH: Roslyn Cassells (Applicant) v. Ecole de Langues la Cité (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

1647-89-G; 1690-89-G: Ontario Provincial Conference, International Union of Bricklayers and Allied Craftsmen, International Union of Bricklayers and Allied Craftsmen, Local 12 (Applicants) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents); United Brotherhood of Carpenters & Joiners of America, Local Union 2222 (Applicant) v. Cooper Corporation Limited, Versa Care Development Corporation (Respondents) (*Withdrawn*)

2589-92-G; 3448-92-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 736 (Applicant) v. Mohawk Services (Respondent) (*Granted*)

0823-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. MacNaughton Electric Company Limited (Respondent) (*Granted*)

0927-93-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Lodge 128 (Applicant) v. Babcock & Wilcox, International Division (Respondent) (*Dismissed*)

1185-93-G: International Brotherhood of Electrical Workers, Local 1687 (Applicant) v. G. Lacasse Electric (Respondent) (*Granted*)

1192-93-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Universal Ceramic and Tile Ltd. (Respondent) (*Granted*)

1321-93-G: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen (Applicant) v. Minho Masonry Ltd. (Respondent) (*Granted*)

1387-93-G: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Roy & Huebert Ltd. (Respondent) (*Granted*)

1718-93-G; 1719-93-G: United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. Peter's Panels Ltd. (Respondent); United Brotherhood of Carpenters and Joiners of America Local 785 (Applicant) v. C & D Limited (Respondent) (*Granted*)

2418-93-G: Construction Workers Local 53, CLAC (Applicant) v. Empire Roofing Corporation (Respondent) (*Granted*)

2484-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Blackburn Utility Electrical (Respondent) (*Granted*)

2591-93-G: International Brotherhood of Painters & Allied Trades Local 1795 Glaziers (Applicant) v. Architectural Aluminum Co. Ltd. (Respondent) v. B.D.O. Dunwoody Ward Mallette Inc. (Intervener) (*Granted*)

2644-93-G; 2645-93-G; 3304-93-G; 3305-93-G: International Union of Bricklayers and Allied Craftsmen, Local 6, Windsor (Applicant) v. Masotti Construction Co. Inc. (Respondent); International Union of Bricklayers and Allied Craftsmen, Local 6, Windsor (Applicant) v. Generation Development Contractors Inc. (Respondent); International Union of Bricklayers and Allied Craftsmen, Local 6, Windsor (Applicant) v. Masotti Construction Company Limited (Respondent) (*Withdrawn*)

2873-93-G: Labourers' International Union of North America, Local 527 (Applicant) v. Pisapia Construction Inc. Pisapia (1979) (Respondent) (*Withdrawn*)

2983-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States of Canada, Local Union 46 (Applicant) v. The State Group (Bracknell Corporation) (Respondent) (*Withdrawn*)

2999-93-G: International Union of Bricklayers and Allied Craftsmen, Local 08 Ontario (Applicant) v. Cadillac Fairview Corporation Limited (Respondent) (*Withdrawn*)

3159-93-G: International Union of Bricklayers and Allied Craftsmen, Local 7 - Canada (Applicant) v. Olivieri Masonry Ltd.; Ottawa-Carleton Bricklaying and Masonry Limited (Respondents) (*Granted*)

3251-93-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Electrical Power Systems Construction Association and Ontario Hydro (Respondents) (*Withdrawn*)

3556-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. 759413 Ontario Inc. T/A. Blackburn Utility Electric (Respondent) (*Granted*)

3563-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. MacNaughton Electric (Respondent) (*Granted*)

3570-93-G: International Brotherhood of Electrical Workers, Local 115 (Applicant) v. J.S. Electric (1989) Ltd., J.S. Industrial Sales & Service Ltd., J.S. Industrial Sales & Service (1993) Inc. (Respondents) (*Granted*)

3689-93-G: The Laborers' International Union of North America on its own behalf and on behalf of Local Unions, 491, 493 and 607 (Applicant) v. Litz Equipment Ltd. (Respondent) (*Withdrawn*)

3734-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. AGIP Structural Steel Limited (Respondent) (*Granted*)

3752-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Page Flooring Enterprises Inc. (Respondent) (*Withdrawn*)

3849-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. C.M. Dipede Group Limited (Respondent) (*Withdrawn*)

3909-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Withdrawn*)

3912-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Hergert Electric Ltd. (Respondent) (*Withdrawn*)

3918-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Cairns Utility Pole Line Construction (Respondent) (*Withdrawn*)

3920-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. John W. Baldwin Electric Company Limited (Respondent) (*Withdrawn*)

3923-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Poce Construction Limited (Respondent) (*Granted*)

3950-93-G: Operative Plasterers and Cement Masons International Association of the United States and Canada Local 598 (Applicant) v. General Waterproofing Inc. (Respondent) (*Withdrawn*)

3964-93-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Lido Drywall Inc. (Respondent) (*Granted*)

3983-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Pit-On Construction Company Limited (Respondent) (*Withdrawn*)

4000-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Mark O'Connor Disposal and Demolition Limited (Respondent) (*Granted*)

4009-93-G: Carpenters and Allied Workers, Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. F. Pellegrino General Contracting Ltd. (Respondent) (*Granted*)

4018-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Glibota Drywall & Acoustics and Ivan Glibota (Respondent) (*Granted*)

4019-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Les Enduits Ispro Inc. and Yves Leger and Ronald Benard (Respondent) (*Granted*)

4023-93-G: Construction Workers Local 53, CLAC (Applicant) v. Empire Roofing Corporation (Respondent) (*Granted*)

4024-93-G: Bricklayers, Masons Independent Union of Canada, Local 1 (Applicant) v. Artcon Masonry Inc. (Respondent) (*Granted*)

4027-93-G: Sheet Metal Workers' International Association Local Union 562 (Applicant) v. Nelco Mechanical Limited (Respondent) (*Granted*)

4032-93-G: International Brotherhood of Painters and Allied Trades Local 1891 (Applicant) v. Aspen Interiors Systems Ltd. and Lorcon Contracting Inc. (Respondents) (*Granted*)

4055-93-G: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the I.U.B.A.C. (Applicant) v. Norman Mowbray Ltd. (Respondent) (*Granted*)

4071-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Urban Mechanical (1979) Ltd. Urban Mechanical Contracting (1979) Ltd. (Respondent) (*Granted*)

4072-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. Main Mechanical Ltd. and The Metropolitan Plumbing and Heating Contractors Association Toronto (Respondents) (*Granted*)

4073-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 46 (Applicant) v. M. Fanone Plumbing Mechanical Contractor Ltd., The Metropolitan Plumbing and Heating Contractors Association Toronto (Respondents) (*Granted*)

4075-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Charles J. Wilson Limited (Respondent) (*Granted*)

4077-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Mount Albert Masonry Ltd. (Respondent) (*Granted*)

4089-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Batoni Construction Inc. (Respondent) (*Granted*)

4102-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. R.B. Morgan Construction Ltd. (Respondent) (*Withdrawn*)

4103-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rock Construction & Management (Respondent) (*Withdrawn*)

4116-93-G; 4117-93-G: International Union of Bricklayers and Allied Craftsmen, Local 23, Ontario (Applicant) v. Franklin Floor Systems (Respondent) (*Withdrawn*)

4135-93-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Lanark Air Systems (Respondent) (*Granted*)

4158-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Livingston Construction Inc. (Respondent) (*Granted*)

4188-93-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Schindler Elevator Corp. (Respondent) (*Granted*)

4190-93-G: Ontario Allied Construction Trades Council on behalf of United Brotherhood of Carpenters and Joiners of America and its Local 27 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

4200-93-G: Labourers' International Union of North America, Local 506 (Applicant) v. P. Aldo & Sons Construction (Respondent) (*Withdrawn*)

4201-93-G: International Union of Bricklayers and Allied Craftsmen, Local 23, Ontario (Applicant) v. Canadian Stebbins Engineering & Mfg. Co. Limited (Respondent) (*Granted*)

4204-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Cooper's Crane Rental Limited (Respondent) (*Granted*)

4205-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Windsor Crane Inc. (Respondent) (*Granted*)

4207-93-G: International Union of Bricklayers and Allied Craftsmen Local 2, Ontario & The Ontario Provincial Conference of the IUBAC (Applicant) v. Bayritz Construction Ltd. (Respondent) (*Granted*)

4209-93-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Withdrawn*)

4217-93-G: International Brotherhood of Painters and Allied Trades Local 1819 (Applicant) v. C T Windows (1988) Ltd. (Respondent) (*Withdrawn*)

4221-93-G: The International Brotherhood of Painters and Allied Trades The Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. National Painting & Decorating Corporation (Respondent) (*Granted*)

4223-93-G: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the IUBAC (Applicant) v. Lewis Masonry (Respondent) (*Granted*)

4225-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Perovich Electric (Respondent) (*Withdrawn*)

4227-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Standard Electric (Toronto 1985) Inc. (Respondent) (*Withdrawn*)

4231-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Simple X Electric (1987) Inc. (Respondent) (*Withdrawn*)

4234-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. 759413 Ontario Inc. T/A. Blackburn Utility Electric (Respondent) (*Withdrawn*)

4237-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Canber Electric Inc. (Respondent) (*Withdrawn*)

4238-93-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Triad Electric Ltd. (Respondent) (*Withdrawn*)

4245-93-G: International Brotherhood of Electrical Workers, Local Union 1788 (Applicant) v. Ontario Hydro and Electrical Power Systems Construction Association (Respondents) (*Granted*)

4246-93-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. D & F Insulation Ltd. (Respondent) (*Granted*)

4278-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Omega Electric Limited, Acadian Electric Limited (Respondents) (*Granted*)

4291-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Scaff-Tech Ltd. (Respondent) (*Granted*)

4293-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Conform (Ont) Inc. (Respondent) (*Granted*)

4311-93-G: International Union of Bricklayers and Allied Craftsmen Local #4 Ontario (Applicant) v. Q-Tech Limited (Respondent) (*Granted*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1700-93-U; 1701-93-M: Associated Contracting Inc. (Applicant) v. Michael Gallagher and International Union of Operating Engineers, Local 793 (Respondent) (*Dismissed*)

2489-93-U: Medlin Morris (Applicant) v. United Food & Commercial Workers International Union Local 114P (Respondent) (*Dismissed*)

2734-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bairrada Masonry Inc. (Respondent) (*Dismissed*)

3604-93-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Campbell-Cox Limited (Respondent) (*Dismissed*)

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ONTARIO LABOUR RELATIONS BOARD REPORTS

A Monthly Series of Decisions from the
Ontario Labour Relations Board

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EDITOR: RON LEBI

Selected decisions of particular reference value are
also reported in *Canadian Labour Relations Boards
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BEFORE: *Gail Misra*, Vice-Chair.

APPEARANCES: *Daniel Adusei and Felicia Adusei* for the applicants; *Risa Pancer, Maureen O'Halloran, Beverly Mednick, Noelle Andrews and Pauline Lefebvre-Hinton* for the responding party; *Jennifer Wootton Regan, Janice Baker and Joan Snapp* for the intervenor.

DECISION OF THE BOARD: May 17, 1994

1. This is an application pursuant to section 91 of the *Labour Relations Act* alleging a violation of section 69. Section 69 sets out the duties and responsibilities of the trade union with respect to representation of bargaining unit members as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

2. The applicants were not represented by counsel at the hearing. At the outset of the hearing, the Board explained to the applicants that, although it is entirely proper to appear before the Board without counsel, applicants who do so incur the risk of so doing. It was explained to the applicants that the Board, as an adjudicative body, was unable to guide them in determining what evidence they should call to support their case, and that they would be entirely responsible for the calling of evidence and the making of submissions to the Board. The applicants indicated that they understood these remarks. The Board outlined to the applicants that they would have the right to call witnesses, cross-examine any witnesses called by the other parties, and the Board also explained the general order of proceeding.

3. The applicants have made a number of allegations against the Ontario Nurses Association (hereinafter referred to as "ONA", the "union", or the "responding party") which are claimed to constitute breaches of section 69 of the Act. While I intend to deal with each of the allegations individually, the following list outlines the most significant of the applicants' concerns:

a) The responding party initially refused to support the applicants in their grievance concerning their placement on the wage grid and did so only after the applicants filed a complaint with the Labour Relations Board alleging a breach of section 69 of the Act;

b) Despite the settlement of that complaint to the Labour Relations Board, and the filing of grievances in accordance with the applicants' wishes, the responding party did not arrange for the scheduling of a hearing of the grievances until two years after the settlement;

c) The hearing of the grievance, scheduled for June 10, 1993, was cancelled

without explanations being given to the applicants, and no new hearing dates have been set;

d) The responding party has not demonstrated a willingness to strenuously protect the interests of Felicia Adusei in Workers' Compensation and Unemployment Insurance matters, and has taken positions in support of the employer intervenor; and,

e) The responding party failed to take all steps necessary to deal with the employer intervenor on the issue of the medical basis for Felicia Adusei's absence from work, which absence had commenced on April 30, 1993; failed to forestall her termination, and generally left Ms. Adusei without support or representation, resulting in Ms. Adusei's termination in August, 1993.

4. In the application to the Board, the remedy requested was that the applicants' grievances be re-scheduled for hearing, and that the Board order the reinstatement of Ms. Adusei to her employment or order the responding party to take all steps to have Ms. Adusei reinstated to her employment. At the commencement of the hearing, the applicants requested the further remedy that the Board order the responding party to pay for the applicants to henceforth have their own counsel in *all* of their dealings with the intervenor employer and that the applicants be allowed to have an outside party file a grievance on Ms. Adusei's behalf.

5. The responding party and the intervenor filed comprehensive replies and documentation to dispute the many allegations made by the applicants. Over the course of five days of hearing, five witnesses were called to give testimony and fifty-one exhibits were filed. Overall, the evidence of actual events is not in dispute although there were some differing understandings of the roles of the various players. As outlined earlier, I will deal with each of the applicants' claims separately, and in doing so will refer to the witnesses' evidence and documents filed as exhibits with the Board in the course of the hearing.

The Law

6. It is generally accepted that in a unionized environment most of an employee's rights and obligations are set out in a collective agreement between the union which holds the bargaining rights for that employee, and the employer. In the absence of some restriction in a collective agreement, an employer has the right to run its business in a manner it considers efficient, so long as it does so in good faith and for valid business reasons. In most workplaces there are also rules and procedures for the efficient functioning of an enterprise, and if a union accepts those rules as being reasonable, the employees are required to comply with them.

7. If an employee or the union feel the employer has not complied with the terms of the collective agreement, a grievance may be filed. A grievance may be successful if the union is able to prove that the employer has breached the collective agreement.

8. The *Labour Relations Act* imposes a duty upon a trade union to fairly represent all of the employees in the bargaining unit for which it holds bargaining rights. The trade union may be found to have violated the Act if it has represented an employee in a manner which is arbitrary, discriminatory, or in bad faith. The Labour Relations Board does not consider whether the union was right or wrong in its approach, but rather whether the union's actions were motivated by bad faith, whether it has discriminated against the employee or whether it acted in an arbitrary manner.

9. In *Kenneth Edward Homer*, [1993] OLRB Rep. May 433, the Board reviewed the jurisprudence outlining what the Supreme Court of Canada and this Board have found to be the principles applicable to a trade union's duty of fair representation. The following excerpt from the case outlines the guidelines applicable to the case before me:

5. ... In *Canadian Merchant Service Guild v. G. Gagnon*, [1984] 1 SCR 509 at page 527, the Supreme Court of Canada reviewed the principles applicable to a trade union's duty of fair representation as follows:

1. The exclusive power conferred on a union to act as spokesman for the employees in a bargaining unit entails a corresponding obligation on the union to fairly represent all employees comprised in the unit.
2. When, as is true here and is generally the case, the right to take a grievance to arbitration is reserved to the union, the employee does not have an absolute right to arbitration and the union enjoys considerable discretion.
3. This discretion must be exercised in good faith, objectively and honestly, after a thorough study of the grievance and the case, taking into account the significance of the grievance and of the consequences for the employee on the one hand and the legitimate interest of the union on the other.
4. The union's decision must not be arbitrary, capricious, discriminatory or wrongful.
5. The representation by the union must be fair, genuine and not merely apparent, undertaken with integrity and competence, without serious or major negligence, and without hostility towards the employee.

This is both a useful general guideline for assessing a trade union's representation and is consistent with the Board's approach to fair representation complaints.

6. Honest mistakes, innocent misunderstandings, simple negligence, or errors in judgement will not, of themselves, constitute "arbitrary" conduct within the meaning of section 69. In other words, a trade union has a kind of "right to be wrong". Terms like "implausible", "so reckless as to be unworthy of protection", "unreasonable", "capricious", "negligent", and "demonstrative of a non-caring attitude" have been used to describe conduct found to be arbitrary within the meaning of section 69 (see, *Consumers Glass Co. Ltd.*, [1979] OLRB Rep. Sept. 861, *I.T.E. Industries*, [1980] OLRB Rep. July 1001, *North York General Hospital*, [1982] OLRB Rep. Aug. 1190, *Seagram Company Ltd.*, [1982] OLRB Rep. Oct. 1571, *Cryovac, Division of W.R. Grace and Co. Ltd.*, [1983] OLRB Rep. June 886, *Smith & Stone, (1982) Inc.*, [1984] OLRB Rep. Nov. 1609, *Howard J. Howes*, [1987] OLRB Rep. Jan. 55, *George Xerri*, [1987] OLRB Rep. March 444, among others). Such strong words are applicable to the more obvious cases but may not accurately describe the entire spectrum of conduct which could be considered to be arbitrary. As the jurisprudence demonstrates, whether particular conduct will be considered to be arbitrary will depend on the circumstances.

7. The term "discriminatory" in section 69 has been interpreted broadly to include all cases in which a trade union distinguishes between or treats members differently without a cogent reason for doing so (see, for example, *The Municipality of Metropolitan Toronto*, [1978] OLRB Rep. Feb. 143, *Douglas Aircraft Co. of Canada Ltd.*, [1976] OLRB Rep. Dec. 779).

8. Actions or decisions motivated by hostility, ill-will or other improper considerations constitute "bad faith" within the meaning of section 69 (see, for example, *Chrysler Canada Ltd.*, [1979] OLRB Rep. July 618, *John Farrugia*, [1978] OLRB Rep. Feb. 152, *Leonard Murphy*, [1977] OLRB Rep. March 146, *Canadian Union of Public Employees Local 1000 - Ontario Hydro Employees Union (sometimes cited as Walter Princessdomu)*, [1975] OLRB Rep. May 444).

9. As I have already indicated, complaints that a trade union has acted in a manner contrary to

section 69 of the *Labour Relations Act* often relate to the manner in which the trade union has dealt with a grievance. While the Board does not act as an arbitrator of a grievance in complaints under section 69, facts material to the grievance will generally also inevitably be relevant to an assessment of the trade union's conduct, and, in some cases (see *Angelo Ritrovato*, [1986] OLRB Rep. Oct. 1401 for example) to an assessment of the appropriate remedy if a breach is found. Also relevant to the Board's consideration of a fair representation complaint are the importance of the grievance(s) in question to the complaining employee(s), the implications of the grievance(s) for other bargaining unit employees and the trade union, the degree of consideration given to the matter by the trade union, and the factors, both relevant and otherwise, which the union considered in making its decision.

10. The Board recognizes that laypersons usually conduct the union's affairs and such persons may not have the skills or training of a lawyer. Thus the standard union officials must meet is to have honestly considered the merits of the grievance, honestly considered the available evidence, and they must take care not to act on the basis of irrelevant factors or considerations. While honest mistakes or errors of judgement do not amount to a breach of the law, each case must be considered on its own merits (see *Ford Motor Company*, [1973] OLRB Rep. Oct. 519, *ITE Industries*, [1980] OLRB Rep. July 1001, and *Leila Yateman*, [1993] OLRB Rep. Aug. 777).

The Applicants' Allegations

a) The responding party's initial refusal to support the applicants in their grievance regarding the wage grid until after settlement of the original section 69 complaint

11. Prior to addressing the specific complaint, it is necessary to provide some background. From the evidence of the parties it seems that Daniel Adusei started work as a registered nurse at the Clarke Institute of Psychiatry (hereinafter referred to as the "Clarke Institute" or the "intervenor employer") on June 6, 1988. Felicia Adusei began working at the Clarke Institute, also as a registered nurse, on August 14, 1989. The Aduseis are originally from Ghana which is where they both received their nursing credentials and worked as nurses prior to coming to Canada. At the time of hire at the Clarke Institute, neither applicant received any credit for previous nursing experience and their respective placement on the wage grid reflected the lack of credit.

12. From Ms. Adusei's evidence it seems that in or around September 1990 the Aduseis became concerned that other registered nurses at the Clarke Institute had been given credit for past nursing experience and they approached the responding party. The applicants believed that the employer was discriminating against them on the basis of their place of training and original experience, and was only recognizing nursing experience from Europe, Britain and Canada. Between September and December 1990 the applicants met with Bev Mednick, ONA's Employment Relations Officer, and Maria Ojczyk, the Local President, to discuss their concerns. In December 1990 the responding party organized a meeting with the intervenor to attempt to settle the question of experience credits, but the applicants did not receive satisfaction. On February 20, 1991, the Clarke Institute sent a memorandum to all nursing staff informing them that "out of country registered nursing experience" would be considered in determining starting salaries. To validate any claim, the claimant nurse was required to supply supporting documentation for hours of out-of-country nursing experience. Reimbursements, according to the memorandum, were to be retroactive to August 1, 1990. It is unclear from the evidence before me what steps the applicants then took. However, in early 1991 a complaint was filed at the Labour Relations Board by Mr. Adusei claiming that ONA had failed to represent him properly because it had not filed a grievance on his behalf regarding the lack of experience credits apportioned to him by the employer.

13. On May 22, 1991, with the assistance of a Labour Relations Officer, the parties reached a settlement of the Board complaint pursuant to which the responding party agreed to file a grievance regarding credit for Mr. Adusei's previous nursing service and his placement on the salary

grid. On May 28, 1991, Mr. Adusei wrote to the Board Officer involved saying he had refused to sign the grievance ONA had drafted because he did not believe it addressed his concerns, and he requested that the Board schedule a hearing. Mr. Adusei indicated he was suspicious of the discussions the Board Officer had privately with ONA representatives during the course of negotiating a settlement. By a letter dated June 26, 1991, Ms. Loretta Mikus, for ONA, explained to the Board the reasons ONA and Mr. Adusei had been in disagreement, and further informed the Board that a grievance signed by Mr. Adusei had been filed on June 14, 1991. As the applicants believe that the responding party cannot represent their interests properly at their impending grievance arbitration, in part because of what the responding party wrote in its letter of June 26, 1991, the following excerpt from the letter is included:

Initially, Mr. Adusei disagreed with our advice when we suggested that he would be unable to claim compensation back to his date of hire. We explained that the remedy for the alleged breach of the collective agreement was limited by several factors, one being the date of filing the grievance, and the other being the date that the Hospital decided to reconsider past experience outside of the country.

Mr. Adusei disagreed strongly with our view on this matter and after several attempts to explain our position to him, we agreed to file a grievance seeking full retroactivity on his behalf.

14. From the evidence before the Board it is clear that a grievance was also filed on Felicia Adusei's behalf on June 13, 1991, and that both grievances seek as a remedy retroactivity back to the applicants' respective dates of hire. The parties have agreed that the grievances will proceed through the arbitration process together. The excerpt from the Mikus letter indicates the union's advice to Mr. Adusei, that Mr. Adusei disagreed with that advice, and that the union followed Mr. Adusei's wishes. The Board can find no animus in the letter suggesting that the responding party will be incapable of strongly arguing for the applicants' remedy at the grievance arbitration. The letter simply indicates the factors which the union anticipates the employer will raise to ask a Board of Arbitration to limit the level of retroactivity. While the applicants characterize the excerpt as an expression of the union's bad faith, the Board does not find it to be such an expression.

15. On July 30, 1991, the Labour Relations Board released a decision which stated that on the agreement of the parties the section 91 application made by Daniel Adusei alleging a violation of section 69 by ONA, was adjourned *sine die* for a period not exceeding one year. The Board never heard from either of the parties until the present application was filed in late 1993.

16. At this late date it is unnecessary for the Board to make any findings with respect to the merits of Mr. Adusei's original complaint. However, having filed a complaint in 1991, settled it, agreed to have the matter adjourned *sine die*, and having had a grievance filed on his behalf, Mr. Adusei's claim that the Board should now consider the facts of that complaint is completely without merit. The union filed grievances in accordance with the applicants' wishes and these grievances proceeded to arbitration. Whatever the merits of the 1991 complaint may have been, having regard to the settlement reached between the parties in May 1991 and the subsequent filing of grievances on behalf of both applicants, the Board finds that the responding party's conduct in this limited respect does not constitute a violation of section 69 of the Act.

b) The responding party did not arrange for the scheduling of a hearing for the grievances until two years after the settlement

17. The applicants contend that the responding party took two years to schedule a hearing for their nursing experience grievances. From a letter dated October 16, 1991, from the applicants to Ms. Mednick, the ONA Employment Relations Officer, it is clear that by October 10, 1991, the

Aduseis had received correspondence informing them that their grievances were proceeding to arbitration. A three-person Board of Arbitration, chaired by Ms. Paula Knopf, had been set up. There was no evidence put before me to explain why a hearing date was not found until June 10, 1993, approximately twenty months after the applicants were informed the grievances were proceeding to arbitration, and approximately twenty-four months from when the grievances had been filed.

18. While the two-year delay in bringing the applicants' grievances to arbitration does appear to be an inordinate delay, that delay in and of itself is not sufficient for me to find that the responding party had breached its duty of fair representation. As will become more clear later in this decision, the responding party did not appear to have abandoned the grievances at this stage and did continue to provide the applicants with assistance regarding the grievances.

19. The applicants claim they were not properly represented at the grievance step meetings in that they were expected to answer questions posed by the employer while the union representatives sat by and listened. It was Ms. Adusei's evidence that Ms. Mednick read from the grievance form what the concern was and explained to the employer the remedy being requested. Ms. Adusei was perturbed that the employer was then permitted to ask her questions directly. Mr. Adusei expressed similar concerns about the conduct of his grievance meetings.

20. From all of the evidence before me, it is clear that the applicants do not understand clearly what the union's role is in the relationship with the employer. Hence the applicants have expected the union to advocate strenuously on their behalf at every encounter with the employer, no matter at what stage in a proceeding. The grievance meeting process is one in which the parties involved attempt to clarify their positions and to consider if there is any way in which the matter in issue can be resolved short of going to arbitration. This process is usually a form of discovery to allow both the union and the employer to know what the factual bases are and where their differences lie. In the applicants' case the issue was what service credits the grievors believed should be apportioned to them based on their prior experience outside of Canada. As such, it is understandable that the union may have seen the applicants as being in the best position to answer the specific questions put by the employer. It is clear from the evidence that the applicants were accompanied by union representatives, those representatives spoke on behalf of the union and the grievors, and that the union then proceeded with the grievances on to the arbitration process when the matters could not be resolved through the meeting process.

21. Having regard to the applicants' allegation of the lack of representation at the grievance meetings, the Board finds no basis for a breach of the Act and finds that the union did not act in an arbitrary or discriminatory manner, or in bad faith in its representation of the applicants. As outlined earlier, while I have some concern about the length of delay between the filing of the grievances and their being scheduled for arbitration, I cannot find on the evidence before me that the union purposefully delayed taking the grievances to arbitration, or abandoned the grievances, thereby acting arbitrarily or in bad faith towards the applicants.

c) The June 10, 1993 grievance arbitration was cancelled without explanations to the applicants, and no new hearing dates have been set

22. From the evidence of various witnesses, including the applicants, it is clear that the responding party contacted the applicants in early May 1993 to begin preparation for the grievance arbitration. Ms. Pauline Lefebvre-Hinton, the ONA Arbitration Officer, contacted the Aduseis in early May, 1993 to set up a meeting to discuss the grievances. On May 17, 1993, Ms. Hinton, Ms. Mednick, and Ms. Kim Bernhardt, a Research Officer responsible for Employment Equity and Human Rights issues at ONA, met at the applicants' home at the applicants' request. While the

substance of the meeting was not in dispute, the Board was asked by the applicants to draw a negative inference from the presence of Ms. Bernhardt at this preparation meeting.

23. The Aduseis had filed two Human Rights complaints against the employer which the Human Rights Commission, by a decision of November 4, 1992, had declined to send to a Board of Inquiry. The applicants had asked the Commission to reconsider its decision. At the grievance preparation meeting of May 17, 1993, Ms. Bernhardt offered to assist the applicants in their application for reconsideration. The applicants claim they had not requested any assistance from the union and are suspicious of the reason for Ms. Bernhardt's presence at the meeting. Mr. Adusei gave evidence that he believed Ms. Bernhardt assisted in writing submissions to the Human Rights Commission to help the union in the complaint now before me. I accept Ms. Bernhardt's evidence that the reason she was present at the meeting was to assist in the preparation for the grievance arbitration as the grievances had a discrimination component to them and she had been hired by ONA to bring her human rights and employment equity expertise to the problems faced by ONA members. I reject the applicants' contention that Ms. Bernhardt was hired specifically to give them the idea that ONA was assisting them while ONA had no intention of helping them. I also reject Mr. Adusei's claim that Ms. Bernhardt assisted in the Aduseis' Human Rights complaint to assist the responding party in this complaint now before me. There is no evidence that the applicants had suggested to the union that they intended to file a complaint with the Labour Relations Board in May 1993. The complaint was not apparently contemplated till October 1993.

24. The Board finds no improper motive in ONA's decision to include Ms. Bernhardt and accepts that the responding party was seeking to provide specialized human rights expertise to the applicants and to its counsel in preparation for the grievance arbitration. Indeed the evidence disclosed that Ms. Bernhardt offered to assist the Aduseis in their reconsideration application to the Human Rights Commission, the Aduseis accepted, and Ms. Bernhardt subsequently wrote a letter to the Commission in support of the Aduseis' application for reconsideration.

25. Following the preparation meeting, according to the applicants, ONA counsel was in touch with the applicants a great deal by telephone, both at home and at their place of work. The last telephone contact on June 8, 1993, led the applicants to believe they would be meeting at the hearing on June 10, 1993. However, at approximately 2 p.m. on June 9, 1993, Mr. Adusei was informed by his supervisor at the Clarke Institute that he was expected to report for work on June 10 as the arbitration had been cancelled. Mr. Adusei then called Ms. Kim Bernhardt to find out why the hearing had been cancelled. Since Ms. Bernhardt told Mr. Adusei to call counsel on the case, Ms. Lefebvre-Hinton, he did so. According to his evidence, Ms. Lefebvre-Hinton did not deny that the hearing was cancelled but did not provide an explanation. She is alleged to have wondered aloud how Mr. Adusei's Head Nurse could have found out about the adjournment so quickly. Since Ms. Lefebvre-Hinton was not called by the union as a witness, I must accept Mr. Adusei's uncontradicted version of the conversation. Mr. Adusei's evidence is that ONA sent the applicants a letter on June 10, 1993, enclosing a number of documents including a copy of a subpoena which had been served on the employer and enclosing a letter from the union to the employer's counsel, Ms. Janice Baker, regarding the relevance of the documents covered by the subpoena. A review of the letter does not disclose any explanation of the adjournment and suggests that Ms. Lefebvre-Hinton would be in touch with the Aduseis "very soon". Mr. Adusei gave evidence of very little contact with Ms. Lefebvre-Hinton after that date. By the time the applicants filed the present complaint, they had received no further information with respect to the status of their grievances and had received no further hearing dates.

26. The Board was shown correspondence indicating that the applicants' nursing experience

grievances are scheduled to be heard on June 30 and November 24, 1994. Mr. Adusei indicated he had recently become aware of the new hearing dates.

27. While the content of Ms. Lefebvre-Hinton's letter of June 10, 1993 suggests that a problem with the subpoena to the employer may have had something to do with the adjournment of the hearing, in the absence of any testimony from Ms. Lefebvre-Hinton, and in light of Mr. Adusei's evidence, I find that ONA did not provide the applicants with a complete explanation of the reason for the adjournment, either before or after the adjournment. I further find that the responding party did not maintain contact with the applicants with respect to the status of their grievances until early in 1994 when the Aduseis were informed of the latest hearing dates in June and November. On the evidence before me, it is unclear what the reason was for the lengthy delay between the adjournment and the new dates being set.

28. The responding party did have some obligation to keep the applicants informed of the progress of their grievances, but I do not find that the responding party had abandoned the grievances. Contrary to the applicants' belief, new hearing dates have been set and the matters are proceeding in the near future. As was outlined in the excerpt from *Kenneth Edward Homer, supra*, simple negligence or errors in judgement will not, in and of themselves, constitute arbitrary conduct within the meaning of the Act. On the totality of the evidence in the case before me, I cannot find that the lack of notification and delay were demonstrative of a "non-caring" attitude towards these applicants. There is also no evidence of hostility or ill-will towards the Aduseis so that I cannot find that the union acted in bad faith with respect to the applicants. While I can understand the applicants' frustration both with not knowing what was happening with their grievances, and with the lack of resolution of grievances which are now almost three years old, the responding party's actions do not constitute a breach of section 69 of the Act.

d) The responding party did not demonstrate a willingness to strenuously protect Felicia Adusei's interests in Workers' Compensation and Unemployment Insurance matters, and took positions in support of the employer

29. From an exhibit introduced by the applicants, it appears the applicant Felicia Adusei slipped on an icy sidewalk outside the workplace while on her way to a work-related conference on January 30, 1990. She filed for Workers' Compensation Benefits and received full benefits while off work from January 30 to April 16, 1990. She returned to full-time work from April 16 to June 6, 1990. Other exhibits put before the Board show that since that time she has either not been able to work at all or has worked three days a week until her discharge on August 9, 1993. From January 30, 1990, to March 11, 1993, Ms. Adusei received her full-time salary from the employer.

30. Ms. Adusei is claiming that the responding party has not assisted her in Workers' Compensation matters. It was, however, her evidence that she chose to go to the Office of the Worker Advisor when she wanted assistance on her compensation claim, and the evidence of both Ms. Adusei and Ms. Mednick is that Ms. Adusei did not want the union to assist her when ONA assistance was offered. In a letter dated June 12, 1992, to Maria Ojczyk, the Local President, Ms. Adusei indicated she was going through an appeal process with the Workers' Compensation Board and was being represented by a Worker Advisor.

31. From Ms. Adusei's evidence on cross-examination, it was clear that Ms. Adusei did not contact the union in April 1992 when her Workers' Compensation benefits were cut off, but instead chose to use the services of the Office of the Worker Advisor. Nonetheless, the evidence indicates that the union attended meetings with the employer and Ms. Adusei in late 1992 and in 1993 to attempt to get the employer to accommodate Ms. Adusei's work restrictions. When it became clear that the employer may change Ms. Adusei's status from full-time to part-time since

she could no longer work more than three days a week, the union told Ms. Adusei a grievance would be filed if the employer changed her status. The responding party also encouraged Ms. Adusei to consider both her short-term and long-term disability options to ensure she would have some continuation of income if the employer took the steps it appeared to be suggesting it would. Ms. Adusei was also informed by ONA in 1993 that she may be eligible for Unemployment Insurance Sick Benefits and should pursue that avenue. It was Ms. Adusei's evidence that she did not need extra assistance from the union and did not want to discuss various matters with the responding party.

32. It was Ms. Mednick and Ms. Adusei's evidence that on April 29, 1993, Ms. Mednick attended a meeting with the Vocational Rehabilitation Worker of the Workers' Compensation Board (also referred to as the "WCB") and with the employer. At the meeting Ms. Adusei agreed to participate in an eight-week program to assist her in getting back to full-time work. Ms. Mednick told Ms. Adusei she could contact the union or the WCB if she had any problems with the program and that ONA would assist her in appealing the WCB decision. Ms. Adusei never began the eight-week program and never told the responding party or the Workers' Compensation Board of her failure to participate in the program.

33. From the evidence before me, it would appear that Ms. Adusei never asked the responding party to intervene with the WCB on her behalf. While she was offered the assistance of the Ontario Nurses Association, she did not avail herself of the offer. The responding party offered this applicant information regarding Unemployment Insurance Sick Benefits and there is no evidence that she investigated that income source. She was also encouraged to apply for long-term disability benefits to ensure she would have some income should the employer terminate her short-term disability benefits. On the totality of the evidence on this issue, I can find no merit to the allegation that the responding party failed to demonstrate a willingness to protect the interests of Felicia Adusei and supported the employer's position.

e) The responding party failed to take all necessary steps to deal with the employer on the issue of the medical basis for Felicia Adusei's absence from work from April 30, 1993, on; failed to forestall her termination, and left Ms. Adusei without support or representation, resulting in Ms. Adusei's termination in August 1993

34. As outlined above, as of April 29, 1993, the union was under the impression that Ms. Adusei was returning to work on April 30 to participate in a vocational rehabilitation program to assist her to return to full-time work. On Ms. Adusei's evidence, she never informed ONA or the WCB that she had become ill right after that meeting or that she was unable to attend at the rehabilitation program. This was despite her assertion that her illness was work-related and she had an on-going contact within the Workers' Compensation Board in the person of her Vocational Rehabilitation worker.

35. It was Ms. Adusei's evidence that the employer requested medical information about her illness, supplied her with a form to have her physician complete, and Ms. Adusei complied and returned it to the Clarke Institute on May 11, 1993. The medical report indicated Ms. Adusei would be off work for an indefinite period of time. Ms. Adusei believes that because her husband called in to the Clarke Institute and indicated her absence was due to a work-related illness, that the union should have known about it and done something to assist her. From the evidence, it was clear there was no communication of this information to the union and Ms. Mednick did not learn about Ms. Adusei's non-attendance at the program until shortly before the May 17, 1993, grievance preparation meeting.

36. Ms. Adusei believes that the union and the employer were working "to get rid of" her.

The basis of her belief is that the union, in the months subsequent to the April 29, 1993, meeting, encouraged Ms. Adusei on a number of occasions to provide the employer with the medical information it was seeking. Ms. Adusei believes the responding party should have been her advocate and by advocating compliance with the employer demands had acted in bad faith towards her. I will address the evidence before me on this issue in some detail and going back to November 1992 as it formed a major part of Ms. Adusei's complaint against the union and led to her finally refusing to have anything further to do with ONA.

37. On November 5, 1992, the union, Ms. Adusei, and the employer met to discuss the work restrictions Ms. Adusei's physician was advocating. The only one which the employer had concerns about was a requirement that Ms. Adusei work only three days per week, not on consecutive days, and for the foreseeable future. Ms. Adusei believed she should be paid on a full-time basis while being accommodated. The employer believed it could not accommodate such a schedule. The parties agreed to meet again in January 1993 to re-evaluate Ms. Adusei's situation and Ms. Adusei continued to work three days a week and to be paid full wages.

38. At a meeting on January 21, 1993, with the employer, the union and Ms. Adusei, it is Ms. Adusei's evidence that the union was asking the employer to accommodate the schedule Ms. Adusei needed, and was exploring for her the possibilities of continuing short-term and long-term disability benefits. Nonetheless, Ms. Adusei believes the union behaved improperly because it did not accept her calculation of what short-term disability benefits she believed were owing to her and, on her evidence, since there was a question about whether the employer may cut her off short-term disability benefits, she believed the union should have filed a grievance and taken it to arbitration even though no such event had occurred at that time. While Ms. Adusei did not ask the union to file a grievance, she believes it should have been filed because she had indicated to the union some concern about this issue.

39. It was Ms. Adusei's evidence that she did ask that a grievance be filed in March 1993. The employer had indicated since she was not likely to ever work full-time again it was considering moving her to part-time status. Ms. Adusei believed she was being harassed by the employer and wanted a grievance filed about the alleged harassment. As the move to part-time had not occurred, the union began a correspondence with the employer to ask what modified work Ms. Adusei could be offered and suggested the union would contact Ms. Adusei's physician to ascertain if she could perform the work. Ms. Mednick, the author of the letters, contacted Ms. Adusei before the March letter was sent and read her a draft which she agreed to.

40. From April 1 to 5, 1993, Ms. Mednick and Ms. Adusei had a number of telephone conversations in which Ms. Mednick indicated the union's willingness to pay for a medical report for Ms. Adusei to satisfy the employer of Ms. Adusei's need for accommodation. The evidence indicates Ms. Adusei did not feel the union should go any further with this avenue. Later in April Ms. Mednick asked Ms. Adusei to recount all the duties she was performing to assist in the union's attempt to get her modified work. On Ms. Adusei's evidence, she indicated she just did the same as everyone else and that the union had a collective agreement so she did not see any point in telling Ms. Mednick about her duties.

41. Following Ms. Adusei's April 29, 1993, absence from work and until her discharge from employment in August 1993, the only medical information Ms. Adusei provided to the employer regarding her illness was the May 11, 1993, medical report. There ensued a long correspondence, which was put in evidence, between Ms. Joan Snapp, for the employer, and Ms. Mednick and Ms. Lynne Harris for ONA, and Ms. Adusei. The gist of the correspondence was that Ms. Snapp, by June had received no further medical information regarding Ms. Adusei's continuing absence from

work, and was requesting such information from Ms. Adusei. Ms. Adusei maintains steadfastly in her evidence that since the employer did not send out to her a medical report form and did not indicate exactly what it wanted to know from her physician, she did not see any reason to respond. Ms. Adusei saw the employer's requests as a form of harassment. The union, in various letters put in evidence, encouraged Ms. Adusei to comply with the employer's request, explained to her why it believed the employer had reason to request such information, and explained what the consequences of non-compliance may be. The union also offered to assist her should the employer seek to terminate her employment, but pointed out to her that her termination grievance may be weakened if she had failed to comply at all with the employer's request for medical reports about her continuing absence.

42. Ms. Adusei's response to the union advice was to see it as the union believing the employer and siding with the employer against her. On August 3, 1993, Ms. Lynne Harris from ONA wrote to Ms. Adusei outlining the collective agreement provisions which the employer may rely on to terminate her employment, the policy at the Clarke Institute regarding absence due to illness, and outlining the provisions of the medical insurance plan which require regular reporting of an ill person's condition. Ms. Harris indicated she had got Ms. Snapp to extend a deadline for Ms. Adusei to respond to August 5, 1993, and advised that it was in Ms. Adusei's best interest to report her condition by that date. Ms. Adusei's response on August 5, 1993, was to Ms. Harris saying she did not think ONA would write on behalf of the employer and that she had no trust or confidence in the union. She asked ONA to stop contacting her.

43. On August 9, 1993, the Clarke Institute terminated Ms. Adusei's employment because she had not satisfied its repeated demands for current information justifying her absence from work. On August 11, 1993, Ms. Harris sent to Ms. Adusei a letter with a termination grievance attached and asked Ms. Adusei to sign the grievance so it could be filed in a timely fashion. The courier-delivered letter was refused by Ms. Adusei and was returned to the union.

44. From her evidence, it seemed Ms. Adusei had her own legal counsel at the time of her discharge, saw no need for the union's assistance, and therefore says she did not contact the union when she received the discharge letter. It was Ms. Adusei's position that since the union wrote to her advising her to comply with the employer's requests for medical information, but the union did not specify what information she should provide, it failed to represent her properly.

45. A review of all of the documentary and oral evidence before me reveals that the union was integrally involved in representing Ms. Adusei's interests throughout her embattled relations with the Clarke Institute about modified work and her illness after April 29, 1993. The quality of the representation was thoughtful and practical, and while Ms. Adusei may not have liked the advice given to her, in all of the circumstances of this case I cannot find that the union was perfunctory or callous in its approach to Ms. Adusei. I therefore find that there is no evidence of the union acting in bad faith or arbitrarily in its representation of Ms. Adusei and find no basis for Ms. Adusei's allegations that the union was working with the employer to have her employment terminated from the Clarke Institute. Despite Ms. Adusei's request that the union stop contacting her, the union nevertheless sent out to her by courier a grievance so that Ms. Adusei's termination could be grieved. That it was not grieved was not the union's fault but Ms. Adusei's as she refused the package containing the grievance and never subsequently, even up to the second day of this hearing, wanted the union to file a grievance on her behalf. At the second day of hearing Ms. Adusei indicated she wished the Board to order that an outside party of her choosing be permitted to file a grievance on her behalf. Even if I had found that the responding party had violated the Act, which I do not find here, I would not have made the order requested by Ms. Adusei. The bargaining relationship is between the Clarke Institute and the Ontario Nurses Association and no outside party

can file grievances alleging breaches of the collective agreement when it is not a party to the collective agreement. The Board does not have the jurisdiction to make some outside party a party to an existing bargaining relationship.

46. One common theme in both applicants' evidence was that the responding party did not file grievances and take those grievances to arbitration for them. It is noteworthy that in addition to the two service credit grievances which are to be heard in the near future, it was Mr. Adusei's evidence that he has another grievance which will be proceeding to arbitration on September 8, 1994. From both applicants' evidence, it is clear that they believe the union should file a grievance for them whether they specifically request one or not and whether or not the union believes a grievance has crystallized.

47. The Board does not require a union, in the course of its duty of fair representation of its members, to file a grievance for each and every perceived slight or member concern. The Board has recognized that the union must have the ability to judge what it believes will further its collective goals and when it is advisable to file a grievance. In *Catherine Syme*, [1983] OLRB Rep. May 775, the Board described the relationship between the grievance procedure and the duty of fair representation in the following manner:

20. Section 68 [now 69] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining union who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

• • •

22. ... Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. ... As a practical matter, a rigid insistence on one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court". Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.

(See also *Leila Yateman*, *supra*, and *Kenneth Edward Homer*, *supra*). This is not to say that the Board may not find there to be a breach of the duty of fair representation where a union has refused to file a grievance on behalf of a member in certain circumstances. On the basis of the evidence before me, I do not find that the responding party was remiss in its duties when it failed to file all of the grievances the applicants would have liked filed. The responding party represented

the applicants' interests through discussions, correspondence, and meetings with the employer, and when it appeared necessary, offered to file grievances for the applicants.

48. I find it difficult, having heard all the evidence and seen the numerous exhibits of correspondence between all of the parties in this case, to comprehend what more the union could have done for Ms. Adusei in the circumstances. The responding party met with Ms. Adusei, took phone calls and letters from her, wrote to the employer on her behalf, advised and counselled Ms. Adusei on what it believed was necessary for her to do to maintain her employment and to be eligible for sick benefits, and, when the possibility of the employer terminating her employment seemed imminent, ONA asked the employer for an extension of the time limit so that Ms. Adusei would have more time to comply with the employer's request for information of the medical basis for her absence. Even after Ms. Adusei had rebuffed the union's assistance, when Ms. Adusei's employment was terminated, ONA nonetheless prepared a grievance for her signature and sent it out to her home. As the evidence indicates, Ms. Adusei refused to accept the letter containing the grievance when it was delivered to her and a grievance was therefore not filed. On the basis of the evidence outlined above, I find no basis for Felicia Adusei's allegation that the responding party failed to represent her on the issue of the medical basis for her absence from work following April 30, 1993.

Conclusion

49. With respect to Mr. Adusei's complaints, as dealt with above, I can find no breach of section 69 of the Act and this complaint is therefore dismissed.

50. While I have some sympathy for the position Ms. Adusei finds herself in, she is not where she is as a result of anything which the responding party has done. Her complaint is therefore dismissed.

51. The Aduseis made numerous allegations, both in their application and in their evidence at the hearing, which suggested that they were and remain highly suspicious of the motives of ONA representatives. There was, however, no substantial evidence to support the applicants' suspicions. Since I have found no breach of the Act, there is no need for me to deal with the request by the applicants for the appointment of counsel of their choice to conduct their respective grievance arbitrations. I am prepared, in the present circumstances, to accept the responding party's assurance that the Ontario Nurses Association is willing to provide the applicants with proper representation when their grievances proceed to arbitration.

2909-93-U Rheal V. Dionne, Norton Smith, Robert Taylor, Robert Hastie and John A. MacDonald, Robert Burgon, and 91 persons listed on Appendix “A”, Applicants v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 199 (St. Catharines) and its Local 1973 (Windsor), Responding Parties v. General Motors of Canada Limited, Intervenor

Duty of Fair Representation - Unfair Labour Practice - Applicants claiming to have been misled by union in relation to early retirement options available to them and seeking \$35,000 each in compensation - Board satisfied that there was no misrepresentation -- innocent or otherwise -- by union - Complaint dismissed

BEFORE: R. O. MacDowell, Alternate Chair.

APPEARANCES: Rheal Dionne, Robert F. Taylor, Norton Smith, Gord McKenna and Barb Shugan for the applicants; Frank Luce, Sym Gill, Ted Sendzik and Nick Dzudz for the responding parties; Karen Weinstein, Elisabeth Campin, Bob Towey and Jim Magarrey for the intervenor.

DECISION OF THE BOARD; May 24, 1994

I

1. The title of this proceeding is amended to include “Robert Burgon” as an applicant, and “CAW - Local 1973 (Windsor)” as a responding party. This amendment is made pursuant to the applicants’ request, and the Board ruling of March 11, 1994. I should note, however, that there was no evidence from Mr. Burgon, nor any direct evidence touching CAW Local 1973.

2. The reference to the “persons in Appendix A” is included for the purpose of completeness. It is not necessary to list their names individually.

3. For ease of reference I will refer to the responding party as “the union” and the intervenor as “GM” or “the employer”.

II

4. This is an application under section 91 of the *Labour Relations Act* alleging that the union has contravened section 69 of the Act. That section reads as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

5. In order to establish a breach of section 69, a complainant must show that the union’s conduct has been:

(a) “arbitrary” - that is, capricious, reckless, flagrantly wrong or grossly negligent [see: *ITE Industries*, [1980] OLRB Rep. July 1001]; or

(b) “discriminatory” - that is, involving invidious distinctions without reasonable labour relations justification; or

(c) motivated by “bad faith” - that is, ill-will, malice, hostility, or dishonesty.

6. Section 69 governs the way in which a trade union is obliged to represent employees. Section 69 imposes no obligation on employers, nor can an employer breach section 69. General Motors became a party to this proceeding because it might be affected by the remedy - although GM's position is that the Board has no jurisdiction under section 91 to make an order affecting *its* rights. In GM's submission, the reference in section 91(4) to "persons" required to take corrective action, is only to persons who have contravened the Act, and, as noted GM cannot contravene section 69.

*

7. The applicants claim that they have been misled by the union in relation to the early retirement options available to them. They seek compensation in the amount of \$35,000.00 each, which is the amount they assert they would have been entitled to receive if the union had acted properly.

8. Applicants Taylor and MacDonald claim that the union contravened the Act when it failed to vigorously pursue a "grievance" alleging a breach of the collective agreement.

9. Mr. Dionne complains that the union should have guided him through the remedies available to him under his union's constitution, and should be paying the applicants' lawyer in this proceeding.

*

10. A hearing in this matter was held, in Toronto, on May 4th and May 5th, 1994. The union and GM were represented by counsel. The applicants were not. Mr. Dionne explained that, despite their number and the size of their claim, the applicants could not afford to retain counsel. He indicated that they were prepared to proceed on their own.

11. All of the parties had the opportunity to call witnesses, and tender documents in support of their positions, and in assessing the relative credibility of those witnesses, I have taken into account such factors as: the clarity, consistency, and overall plausibility of the testimony when subjected to the test of cross-examination; the firmness of the witnesses' recollections; the ability of the witnesses to resist the tug of self-interest or self-justification when framing their answers; and what seems most probable in all the circumstances.

12. In my view, much of the conflict in the evidence is attributable to faulty memory or misunderstanding rather than mendacity. However, to the extent that it is necessary to choose, I prefer the evidence of the union witnesses whenever there is a material conflict with that of the applicants.

13. Much of the background is not in dispute.

III

14. With the exception of Mr. Burgon, the applicants are all employees of General Motors who have worked at its St. Catharines plant for many years. The union is their collective bargaining agent. The most recent collective agreement at St. Catharines expired in September 1993.

15. In the last few years, GM has been involved in a process of restructuring in order to meet competitive pressures. One of the effects of that restructuring has been the permanent lay-off of hundreds of employees, at St. Catharines, and elsewhere. Those lay-offs are typically administered in accordance with employee seniority.

16. One of the effects of a strict seniority system is a preference for older workers over younger ones, who might have greater family responsibilities. Accordingly, the union and GM began to explore alternative ways to reduce the labour force so that the “downsizing” could be accomplished as painlessly and equitably as possible. One of the ways of doing that was to encourage voluntary early retirement.

17. Employees have been able to take early retirement since at least 1990. However, between late 1992 and the fall of 1993 the union and the company developed three additional options, referred to in these proceedings as the “1.9 plan”, “the \$250 plan”, and the “\$35,000 buy out”. These plans become available when there is a “triggering restructuring event”, resulting in the prospect of permanent lay-offs.

18. The details of these various options are contained in the documents filed with the Board, and need not be reproduced here. It suffices to say that each plan was designed to encourage employees to leave the work force. Each plan had different features, which might be more or less attractive to particular employees, depending upon their seniority, wage rates, classification, pension credits, entitlement to supplementary unemployment insurance benefits (SUB), what they might wish to do after leaving GM, and so on. And each plan had a feature that was later to prove critical to the applicants in this case: once the employee had signified his/her choice, completed the required documentation, and waited the prescribed “cooling off period”, the decision became irrevocable. The employee could not thereafter change his/her mind. S/he was obliged to depart on the agreed upon terms.

19. Senior employees were not required to accept any of these options. But if they chose to do so, the decision could not later be rescinded. And once the choice had been made, employees could not switch options - even if they later came to regret their choice, or some new incentive program was proposed.

20. I should also note, parathetically, that there were some limitations on the number of employees who could take particular options, and other limitations on the *time* for doing so. One employee’s choice could affect the options available to others; and if the option was not taken up within the prescribed time, it might no longer be available.

21. The applicants do not really dispute that the documents they signed purported to make the choice final, binding, and irrevocable. Nor do they dispute that GM has maintained that position throughout, and has insisted that employees adhere to the particular decision that they have made. Employees were not permitted to belatedly change their minds. There is no allegation that the company ever suggested otherwise. *There is no evidence that the union and GM ever agreed or ever intended that employees could revoke their written applications, switch choices, or reject an agreement upon a particular plan in favour of another or later one.* Once the choice was made the employee was locked in.

22. In November 1992 when the “1.9 plan” was offered the union held information meetings to advise employees of its features and answer any questions that they might have. Company officials were also present to explain the terms of the plan. The union subsequently made SUB representatives and pension representatives available for individual consultations. Quite a number of employees took advantage of this opportunity to canvass the options and discuss their personal circumstances.

23. Employees were advised that their decision was an important one because they were being asked to consider “the rest of their life”. Employees were told to carefully consider their situation, because this particular opportunity might not be available in the future. By the same token,

employees were warned that if they “opted in” their choice would become irrevocable. Employees were advised to make a personal decision in consultation with their spouses, advisors, etc., and not to be unduly influenced by the choices made by other employees. No employee was forced to accept the incentive, and all employees had an opportunity to think about it.

24. In November 1992 no one knew that another incentive program would become available a few months later. In consequence, no one was told that if they opted for the “1.9 plan” they could switch to any new plan that might come along later. In November 1992 there was no discussion about the “\$250 plan”, since this opportunity had not yet been established.

25. In May 1993 the company and the union agreed upon what the parties described as the “\$250 plan”. This new arrangement was influenced by developments in the United States, and a growing awareness that existing plans did not provide sufficient incentive for employees to leave the work force. The \$250 plan was different from the 1.9 plan and remained open for eligible employees until August 1993.

26. As before, there were meetings to explain the details, and union and company representatives were available to consult employees on an individual basis. As before, employees were urged to carefully consider their personal circumstances because the decision was important and would be irrevocable once made. And as before, there was no discussion of any other options. The “\$35,000 buy out” had not yet been devised.

27. During the course of the discussions about the 1.9 and the \$250 options, the applicants were asked to consider their future. In doing so, some of them asked questions about their future *pension entitlement* and how it might be affected by future collective bargaining. Information was provided based upon rates negotiated in the existing collective agreement; however, employees were also assured that *they would receive whatever PENSION INCREASES were bargained in the new collective agreement* which was to be re-negotiated in September - October 1993.

28. *Despite the applicants’ testimony to the contrary, I find that they were not told that they would have a right to participate in any new early retirement options that might emerge from negotiations.* Nor were they told that they could discard the plans that they had irrevocably selected in favour of any new plan which might be developed. They were only told that if pension rates increased as a result of collective bargaining, that increase would be passed along to them. Prior to September 1993 (i.e. after the \$250 option had closed) no one knew that there would be a third alternative: the so-called “\$35,000 buy out”.

29. The CAW and the automobile companies engage in what is known as pattern bargaining. The union selects one company as the target for intensive negotiations, and once a settlement has been reached, the other companies are expected to fall in line. In 1993, the target company was Chrysler. Bargaining began in earnest in July 1993.

30. The union went into the Chrysler bargaining with a general demand for improvements to the job security package. There were no detailed demands in this regard. A number of issues were discussed, and eventually Chrysler agreed to a “cash buy out” as an additional incentive to early retirement/voluntary severance of employment.

31. GM adopted the same mechanism some weeks later. The sum of \$35,000 represents the average projected payment to eligible employees.

32. *There was no intention to make this option available to GM employees who had already agreed to leave the labour force in accordance with other early retirement incentives. The new buy*

out terms do not extend to those employees. Nor did the union or employer ever tell the applicants that they did, or would.

33. I do not doubt that some of the applicants may have *believed* that they were entitled to participate in the new option, because of the way in which it was described in an article in a union newspaper. There may have been some confusion. Others apparently linked the enhancement of their pension benefits (to which they were entitled and which did flow from the 1993 round of bargaining, as expected) with the new buy out option that emerged from the same bargaining but to which they were not entitled. And, no doubt, the applicants *believe* that they *should* be entitled to the new option which, in some cases, is more attractive to them than the one which they selected in late 1992 or mid 1993. *But I repeat: there was never any intention to make the \$35,000 buy out available to persons who had already agreed to leave the work force on other arrangements; nor was there any promise, undertaking, or representation prior to bargaining that any new option would be available to persons in the applicants' position.*

34. Having considered the evidence tendered by the applicants, I am satisfied that there was no "misrepresentation" - innocent, or otherwise.

35. I need not decide whether the views of particular applicants are the result of mistake, misunderstanding, or wishful thinking. I need only find, as I do, that there was nothing arbitrary or discriminatory in the way that the applicants were represented. Nor was there any bad faith.

36. Their main contention, therefore, must be rejected.

IV

37. The Taylor/MacDonald "grievance" arises from the effort of these employees to cancel their agreement to take the 1.9 option, after the date for rescission had passed.

38. In or about December 1992 Ted Sendzik, a pension representative tried to persuade the company to allow Mr. MacDonald and Mr. Taylor to withdraw their application for early retirement despite the passing of the deadline for doing so. The company refused - pointing out that the document the employees had signed was clearly stated to be irrevocable. As a result of this rebuff, MacDonald and Taylor signed grievances alleging that the company's action was a breach of the collective agreement.

39. Peter Watson, a union "committee person" received the grievances. However, Watson advised the two employees that the grievances "would not fly". He said that the grievances did not make out a breach of the collective agreement.

40. Watson also advised the employees that, in the circumstances, it was unwise to file a grievance that was without merit, and that he would not do so. MacDonald agreed to that course of action and, at the time, Taylor did not object. Later, though, Taylor complained that the grievance was not being processed; and he now asserts that Watson's action was a breach of section 69 of the Act.

41. Later lobbying has resulted in the resurrection of these grievances so I will be somewhat circumspect in my comments about them. There was no evidence to indicate that Watson was "wrong" in his conclusion that the grievances were without merit. There was nothing to indicate that the company's refusal to exceed to the employee's request constitutes a breach of some provision of the collective agreement, and thus a proper foundation for a grievance. There is nothing to demonstrate that Watson's conclusion was "discriminatory" or "arbitrary" and no evidence that it

was undertaken “in bad faith”. There is, in summary, nothing to establish that Watson’s decision constitutes a breach of the Act - although, of course, Mr. Taylor does not agree with it.

42. Mr. Taylor’s position is based upon a misunderstanding of the union’s obligation, both in general, and under section 69 of the Act. Mr. Taylor asserts that a union official is *obliged* to accept and process any grievance, regardless of its merits. Mr. Taylor asserts that under section 69, a union official is required to proceed through the grievance procedure, even if s/he thinks the grievance has no merit and does not disclose a breach of the collective agreement. But Mr. Taylor is wrong, - as the Board noted in *Catherine Syme*, [1983] OLRB Rep. May 775:

20. Section 68 [now 69] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining union who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an “out of court” settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any particular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if either party obstinantly adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence on one’s “strict legal rights” or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interests of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his “day in court”. Such position not only represents a waste of the employees’ money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union’s claim.

43. There is nothing improper or illegal in the way that the union responded to the MacDonald/Taylor grievances.

44. I turn, then, to Mr. Dionne's complaints.

V

45. Under the *Labour Relations Act* a trade union can become the exclusive bargaining agent for employees in a defined bargaining unit, and once the union is established the employees cannot bargain with their employer on their own. They are part of a group that bargains collectively through the trade union as bargaining agent. On the other hand, section 69 of the Act provides a counterweight. Under section 69, the union must represent the members of the bargaining unit in a manner that is neither arbitrary, discriminatory or in bad faith.

46. The duty of fair representation applies to the way in which the union represents employees *in their relationship with their employer*. Because the employees cannot bargain on their own, the union must represent them fairly. However, section 69 does not regulate the relations of employees to each other, or to their union as an organization. It does not regulate internal union affairs.

47. Matters such as elections, qualifications for office, dues, internal hierarchy, appeal procedures, and so on, are not governed by the *Labour Relations Act*. They are regulated by the union's constitution. That constitution cannot diminish an employee's statutory rights, but those constitutional rights are not statutory. Nor may constitutional claims be pursued under section 69 or before the Board. Section 69 governs the way in which the union represents employees vis-a-vis their employer - not the way it conducts its internal union affairs.

48. Mr. Dionne claims that in his 30 years as a union member he has never received a copy of his union constitution. He concedes however that he never asked for one.

49. Mr. Dionne also complains that the union should have explained the constitution to him and outlined the procedure by which aggrieved members could pursue an appeal. But there is no evidence that Mr. Dionne was misled about such options, and there is ample evidence of communications and meetings to explain to Mr. Dionne and others that they were mistaken in their belief that they could participate in the \$35,000 buy out plan. The union tried to explain that the latest "buy out" was not open to those who had already taken other options. The negotiated terms did not apply to such persons, nor could they switch options now. The union tried to explain that the only pension enhancement flowing from the 1993 bargaining was an increase in rates. This was what union officials were referring to prior to the negotiations in the fall of 1993. However, Mr. Dionne rejected that explanation and filed this complaint.

50. These matters do not fall within the ambit of section 69; and, in any event, do not disclose any of the elements outlined in section 69.

51. In so finding, of course, I make no comments upon the rights (if any) which Mr. Dionne or others may still have under the union constitution.

VI

52. For the foregoing reasons, this complaint is dismissed.

0221-94-G; 4276-93-U; 4316-93-G International Union of Elevator Constructors, Local 50, Applicant v. **Dixie Elevator Ltd.**, Responding Party; Robert Fraser Jr., Applicant v. International Union of Elevator Constructors, Local 50, Responding Party; International Union of Elevator Constructors, Local 50, Applicant v. Miro Elevators Limited, Responding Party

Construction Industry - Construction Industry Grievance - Discharge - Timeliness - Practice and Procedure - Unfair Labour Practice - Board declining to dismiss grievances as untimely - Board declining to defer hearing of grievances until unfair labour practice complaint heard or until appeal to international union resolved

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *R. W. Pirrie* and *H. Peacock*.

APPEARANCES: *B. Chercover* and *C. Murray* for the applicant; *Carl Peterson*, *Roger Girling* and *Mike Nichols* for the responding party Miro Elevators Limited; *C. J. Abbass* and *Robert Fraser Sr.* for the responding party Dixie Elevator Ltd.

DECISION OF THE BOARD; May 25, 1994

1. The first two applications captioned above are referrals to the Board of grievances under section 126 of the Act, alleging that Miro Elevators Limited ("Miro") and Dixie Elevator Ltd. ("Dixie"), respectively, have violated the provincial agreement between the International Union of Elevator Constructors ("the Union") and the National Elevator and Escalator Association, to which the responding parties are bound.

2. The third application is a complaint under section 91 of the Act, brought by Robert Fraser Jr., who claims to be one of the principals of Dixie, that the Union has breached section 70 of the Act.

3. At the first day of hearing of the two grievances, the Board dealt with a number of preliminary matters raised by the parties, and made the following oral ruling:

We are prepared at this time to give a brief bottom-line ruling as to the preliminary matters raised today, and to subsequently issue written reasons for this ruling.

The application by the responding party Miro Elevator for a dismissal of the grievance against them without hearing evidence is denied. The applicant will thus be given an opportunity to call evidence and make further submissions to attempt to establish a breach of the collective agreement by Miro.

With respect to the objection that the grievances should be dismissed as untimely, we are not prepared to dismiss the grievances on these grounds as a preliminary matter. This ruling does not preclude either of the responding parties from raising the timing of the filing of the grievances as it may relate to retroactive remedy, and does not prevent Miro from calling evidence and/or making argument concerning the potential effect of the August 6, 1993 grievance in terms of an estoppel on the union.

The request by the responding party Dixie Elevator that we defer the hearing of the grievances until the complaint alleging a violation of section 70 filed by Mr. Fraser Jr. is heard by this Board is denied. We have concluded, however, despite the legitimate concerns expressed by Miro concerning their unnecessary involvement in the section 70 complaint, that the complaint filed by Mr. Fraser Jr. should be heard together with these two grievances by the same panel. Having regard to the onus in these two proceedings, we propose the following procedure: the applicant will proceed first to enter its case on the two grievances; Miro will then respond on the

grievance against it; Dixie will respond to the grievance against it and at the same time enter its case on the section 70 complaint; the applicant will be given an opportunity to respond to the responding parties evidence on the grievances and to the section 70 complaint; and Dixie will be given a final opportunity to call any reply evidence on the section 70 complaint. We hope that this approach will minimize any inconvenience to the responding party Miro.

The responding party Dixie's request that we defer the hearing of these grievances until the appeal filed by Mr. Matthews to the international union is resolved, is denied.

Our reasons for this ruling are set out below.

DISMISSAL OF GRIEVANCE AGAINST MIRO

4. Each of the grievances against Miro and Dixie allege that the employers have violated Article 10 of the Collective Agreement, which requires that employers use the Union's hiring hall as a first source of job applicants. The specific complaint is that the employers have employed Robert Fraser Jr. and Gary Matthews as helpers without them having been referred through the hiring hall.

5. On March 8, 1994, a grievance to that effect was filed by the Union against Miro. In its response to the referral to the Board, Miro claims that Dixie is in fact the employer of these two individuals, and that any work performed by them for the benefit of Miro has been carried out under the auspices of a sub-contract to Dixie. Subsequently, on April 11, 1994, the Union filed a further grievance against Dixie. In the response filed by Dixie on May 4, 1994, Dixie claims to be the employer of Fraser Jr. and Matthews, and acknowledges that they have been working under a sub-contract from Miro.

6. Miro thus took the position at the hearing that, given the existence of the second grievance and Dixie's acknowledgement that it is the employer, the grievance against Miro should be dismissed at the outset without hearing evidence. Essentially, its counsel submitted that the Union must be required to make its election as against whom it wishes to grieve, and that in filing the second grievance it has effectively made that choice. Miro further pointed out that there was no prejudice to the Union in having to choose, as Dixie had come forward and claimed to be the employer and would thus be liable for any findings of a breach of the agreement.

7. The Union, however, articulated a theory of its case which requires that Miro remain as a party to these proceedings. In the submission of counsel for the Union, Miro has engaged in a chain of conduct, including entering into a sub-contract with Dixie, in order to avoid referrals from the Union hiring hall and instead to obtain the services of specific individuals, namely Robert Fraser Sr., a senior mechanic and now one of the principals of Dixie, along with his son Fraser Jr., and Gary Matthews. Counsel characterized the sub-contract between Miro and Dixie as a "sham", and suggested that the individuals working with Dixie may in fact be dependant contractors of Miro, and thus its employees within the meaning of the Act. While the Union may have a remedy against Dixie for giving work to Fraser Jr. and Matthews without a proper referral, it may also have a remedy against Miro, such as a voiding of the sub-contract, for engaging in a course of conduct which the Union claims was motivated by an intent to avoid Article 10 of the Agreement.

8. After considering the submissions of the parties, we concluded that the Union might indeed be entitled to some remedy against Miro specifically, if it is able to adduce evidence to support its theory of the case as described above. For that reason, we were not satisfied that the grievance against Miro should be dismissed at the outset without giving the Union opportunity to call evidence to establish a violation of the agreement by Miro. Our conclusion might have been different had the Union simply named the two employers as alternative sources of liability, but we are

satisfied, on the outline of the Union's case, that the allegations against Miro and Dixie, while related, arguably give rise to distinct violations by each of them.

DISMISSAL AS UNTIMELY

9. Both responding parties asked that the grievances be dismissed in part as untimely. They relied upon an earlier grievance filed by the Union on August 6, 1993, which made substantially similar allegations to those contained in these grievances but with respect to Fraser Sr. and Fraser Jr., without reference to Gary Matthews. This grievance was apparently not pursued, and certainly was not referred to the Board. It demonstrates, however, in the submission of Miro and Dixie, that the Union was aware of the circumstances giving rise to the instant grievances many months before they were filed and referred to the Board. As such, it was submitted, the present grievances should be dismissed as untimely as they relate to Fraser Jr.

10. The grievance procedures established by Article 14 of the provincial agreement are somewhat unusual in that no time limit is set for the initiation of a grievance relevant to the time at which the grieving party becomes aware of the circumstances giving rise to a complaint. Once a grievance is filed, there are certain time limits established for responses and meetings of a Joint Industry Committee; it was admitted, however, that this Committee is defunct and that in any event these processing deadlines do not apply to a grievance referred directly to the Board.

11. Counsel for Miro, however, argued that some time limit must be implied for the initiation of a grievance, and that the delay here was excessive. He further submitted that the conduct complained of here is not a continuing grievance as it relates to the hiring of certain employees which can be fixed as occurring at a certain point in time. He did not really make an argument as to the application of *laches*, however, as he acknowledged that there was no specific prejudice to the employer arising out of the delay other than general concerns about fading recollections, etc., and accepted that any prejudice relating to liability might be dealt with by an order limiting retroactive remedy.

12. The Union responded in part by outlining certain evidence which it would call relating to delay. Its counsel stated that the August 1993 grievance was filed at a time when it had no clear evidence of a violation of Article 10 by Miro, but only suspicions. These suspicions were abated somewhat by a letter they received from Mr. Peterson in June 1993, making representations on behalf of Fraser Jr. who was seeking to be issued a work permit by the Union, in which it was stated that Fraser Jr. was not and had not been working for some time due to the lack of a permit. In any event, the Union decided not to proceed with the grievance at that time.

13. The present grievances were initiated after particular incidents occurred on February 28, 1994 involving both Fraser Jr. and Matthews, with the grievance against Dixie being filed only after the Union learned, through the claims made by Miro in its response, that Dixie was the alleged employer of these individuals. As such, the Union submitted that both grievances were initiated in a timely fashion, and that they were referred promptly to the Board.

14. Given that there is no time limit established in the collective agreement for the initiation of a grievance once circumstances giving rise to a complaint come to light, we were of the view that it was impossible for us, in a preliminary fashion, to dismiss any part of these grievances as untimely. The cases relied upon by the responding party Miro all relate to the situation where a referring party fails to comply with a deadline for the delivery of a written grievance set out clearly in the collective agreement between the parties. Where, as here, there is no limit established by the agreement, it cannot be said that a matter is inarbitrable due to a failure to comply with the requirements of the agreement.

15. Given our conclusion in that regard, it was not necessary for us to consider whether or not to exercise our discretion under section 45(8.3) of the Act to extend the time for any step in the grievance procedure under the collective agreement. We note, however, that it would in any event have been necessary to hear evidence before making a determination under this provision, as the Union indicated that it would call evidence to establish reasonable grounds for the delay.

16. Similarly, we concluded that it would not be appropriate to rule in a preliminary fashion on the effect, if any, of any delay by the Union on remedy, or to deal with any issue of an estoppel on the Union arising from the filing of the earlier grievance in August 1993. While estoppel was not argued specifically by Miro as part of its preliminary objection, the spectre of an argument based on estoppel is raised by its response to the application. Such an argument would, however, clearly require the hearing of evidence, and as such can, like issues of retroactive remedy, be more properly dealt with in final argument.

17. Finally, we note that the responding party Dixie made certain additional arguments around the timeliness of the grievances as they relate to Matthews. In that regard counsel for Dixie relied upon a letter allegedly sent to the Union on February 9, 1994, by someone on Matthews' behalf, indicating that he would be working for Dixie beginning on February 14, 1994. In order to grant this objection, we would have had to hear some evidence concerning the delivery and receipt of this letter, but we were satisfied that in any event the delay from February 9, 1994 to April 11, 1994 was not excessive, particularly given the absence of any time limit in the collective agreement.

18. For these reasons, we declined to dismiss any part of the grievances as untimely, while noting that our ruling does not preclude either of the responding parties from raising the timing of the filing of the grievances as it may relate to retroactive remedy, and does not prevent Miro from calling evidence and/or making argument concerning the potential effect of the August 6, 1993 grievance in terms of an estoppel on the union.

DEFERRAL OF GRIEVANCES

19. The third application captioned above is a complaint filed by Fraser Jr. against the Union, alleging that it breached section 70 of the Act by refusing to provide him with a work permit which would have made him eligible for referral. This complaint of discrimination by the Union is one of the defences raised by Dixie to the allegation of a breach by the company of the hiring hall provisions of the collective agreement. As such, a determination by the Board as a result of that complaint that the Union did in fact discriminate against Fraser Jr. and that he should have been permitted to work might be relevant to the question in these grievances of whether or not Dixie violated the collective agreement.

20. Because of this relationship between the complaint filed by Fraser Jr. and the present grievances, counsel for Dixie sought deferral of the hearing by the Board of these grievances until after the complaint is heard and determined. A hearing of the complaint has been scheduled for May 19 and 20, 1994, but it was not clear whether or not the hearing would be finished on those two days.

21. While we accepted that these matters were clearly interrelated, we were of the view that a consolidation of the three proceedings, rather than a deferral of one of them, is a more appropriate response to the situation. Having a single panel of the Board hear the three grievances and the complaint together is an efficient allocation of resources, but will also avoid the possibility of conflicting factual findings which might otherwise occur, even with a deferral. In addition, consolidation will protect Miro and the Union from an unnecessary delay in the resolution of the other

issues raised in the grievances, which do not really relate to the narrow issue in the complaint of Fraser Jr.

22. While the Union did not really oppose these matters being heard together, counsel for the Union and counsel for Miro both expressed concern that consolidation would involve Miro unnecessarily in lengthier proceedings with which they are not directly involved. While we were sympathetic to these concerns, we were of the view that some response by the Board was necessary in order to avoid the possibility of conflicting findings, and having determined that deferral would not be an appropriate response to the situation for the reasons set out above, consolidation was really the only option available to us. In order to minimize the inconvenience to Miro, however, we proposed the order of proceeding set out in paragraph 3 above. We note, however, that this procedure is not written in stone, and that the panel hearing the merits may entertain modifications to it, particularly if the parties are able to agree on an alternative approach.

23. Counsel for Dixie also asked that these grievances be deferred pending the outcome of certain internal union proceedings relating to the employ of Matthews. Given the choice by Fraser Jr. to bring his complaint about the Union's conduct to the Board, it would seem inconsistent to require the other parties, as Mr. Abbass suggested, to "exhaust all internal remedies". In any event, we were satisfied that the grievances raise issues around the interpretation and application of the collective agreement which are clearly within the Board's jurisdiction under section 126 of the Act, which may require some interpretation of the Union's constitution, but which would not be governed by any finding by an internal union tribunal in Matthew's appeal to the international union. For that reason, we denied this request for a deferral of the proceedings.

24. As a result of our rulings, all of the above-captioned applications will be heard together at a hearing to continue on June 15 and 16, and September 27, 28, 29 and 30, 1994. This panel is not seized of the merits of the applications.

4446-93-G International Association of Bridge, Structural and Ornamental Ironworkers, Local 700, Applicant v. E. S. Fox Limited; Ontario Erectors Association Incorporated, Responding Parties v. Millwrights District Council of Ontario on its own behalf and on behalf of its Local 1244, Intervenor

Adjournment - Construction Industry - Construction Industry Grievance - Jurisdictional Dispute - Practice and Procedure - Ironworkers' union grieving failure to assign its members certain work - Millwrights' union seeking to intervene - Millwrights' submitting that grievance inarbitrable because Ironworkers' asking Board to enforce order made in *The State Group* case and because dispute raised in grievance is jurisdictional dispute - Board adjourning section 126 proceeding pending filing and disposition of jurisdictional dispute complaint under section 93 of the Act

BEFORE: *George Surdykowski*, Vice-Chair, and Board Members *W. N. Fraser* and *G. McMe-nemy*.

APPEARANCES: *S.B.D. Wahl* and *G. Michaluk* for the applicant; *Allen V. Craig* and *Moe Brou-seau* for E. S. Fox; *N. L. Jesin* and *H. Carruthers* for Millwrights.

DECISION OF THE BOARD; May 19, 1994

1. The name of the responding party E. S. Fox Ltd. is amended to: E. S. Fox Limited.
2. This is a referral to the Board of a grievance in the construction industry, pursuant to section 126 of the *Labour Relations Act*.

3. By letter dated March 1, 1994, the applicant "Ironworkers" grieved as follows:

Please be advised that E. S. Fox is in direct violation of the Collective Agreement between Iron Workers District Council of Ontario and the Ontario Erectors Association to which E. S. Fox is signatory.

Specifics of the violation are:

That E. S. Fox Ltd. have failed to properly assign work at the job site (Atlas Tube, Harrow, Ontario) as per the operative provisions of the Collective Agreement; thereby *not* employing the required number of Iron Workers Local 700 members.

As discussed in previous correspondence with yourself, as well as site supervisor Shane McIntosh, the proper work assignment for the scope of work at Atlas Tube is:

An equal number of Iron Workers Local 700 members and Millwright Local 1244 members performing ALL work functions interchangeably.

Please accept this grievance as Step 2 of Article 24 - Grievance and Arbitration contained in the Collective Agreement.

4. In this application, the Ironworkers seek the following relief:

- (a) A Declaration and Order that E.S. Fox Ltd. has violated the outstanding Orders of the Ontario Labour Relations Board and the Collective Agreement between the Ontario Erectors Association Incorporated and the International Association of Bridge, Structural and Ornamental Ironworkers and the Ironworkers' District Council of Ontario effective until April 30, 1995 ("the Collective Agreement") in failing to perform work at the Atlas Tube Project, Harrow, Ontario ("the Project") in accordance with the work assignment set out below.
- (b) A Declaration and Order that the Ontario Erectors Association Incorporated and E.S. Fox Ltd. assign and perform all construction industry work in connection with the installation, erection, dismantling, alteration or relocation of material handling systems inclusive of all types of conveyor systems, machinery and/or equipment including the offloading, rigging, handling, placement, alignment, levelling, securing and adjusting thereof at the Atlas Tube Project, Harrow, Ontario, and throughout the County of Essex and Kent (O.L.R.B. Geographic Area #1) with a crew consisting of equal numbers of members of:
 - (i) the International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 ("Ironworkers, Local 700"); and
 - (ii) Millwrights, Local 1244, United Brotherhood of Carpenters and Joiners of America ("Millwrights, Local 1244"),

without limiting the work functions of either trade and either trade performing all work functions interchangeably.

- (c) An Order that E.S. Fox Ltd. not assign work to any trade or employee other than a member of Ironworkers, Local 700 in accordance with the Order set out above, defeating the purpose, intent and provisions of the Collective Agreement, contrary to the Collective Agreement and, in particular, Articles 1 and 2 and Appendix "A" thereof.

- (d) An Order that E.S. Fox Ltd. notify Ironworkers, Local 700 as soon as possible, but no later than twenty-four (24) hours prior to any job starting and advise of the approximate number of Ironworkers, Local 700 members required to perform the work.
- (e) An Order of Damages against E.S. Fox Ltd. in respect of all wages and all other employment benefits inclusive of interest thereon, pursuant to the Collective Agreement and at Law.
- (f) An Order that E.S. Fox Ltd. pay to the Ironworkers, Local 700 its fees and expenses, legal or otherwise, as it may have incurred by reason of the aforementioned violation of the Collective Agreement.
- (g) An Order that the Ontario Erectors Association Incorporated, at its own expense, place a full page ad in the Southam Building Reports and Daily Commercial News publicizing the Orders binding upon all members of the Ontario Erectors Association Incorporated with respect to the assignment of work set out above.
- (g) Such further and other relief as may be appropriate in the circumstances.

5. The Millwrights District Council and Millwrights, Local 1244 (jointly the "Millwrights") seek to intervene in this proceeding. They refer to the Board's decision in *The State Group Limited*, [1993] OLRB Rep. Dec. 1397 where, at paragraphs 6 and 7, the Board disposed of the jurisdictional dispute complaint as follows:

6. In the circumstances we order and direct that:

all construction work in connection with the installation, erection, dismantling, alteration, relocation, and repair of material handling systems inclusive of all types of conveyor systems, machinery and/or equipment including the off loading, rigging, handling, placement, alignment, leveling, securing, adjusting and repairing thereof at the D.N.N. Hot Dip Galvanizing Line #1, Windsor, Ontario should be assigned to a crew consisting of equal number of members of Ironworkers, Local 700 and Millwrights Local 1244 performing all work functions interchangeably.

7. We have further determined and direct that our order with respect to the assignment of this work in relation to a material handling system is to be binding upon all the parties named in the complaint including the employer contractor who assigned the work and the two employer organizations named in the application. Further, pursuant to section 93(2) of the Act, our order is binding as well upon all other future jobs undertaken in Board Area #1. Our order applies to assignments made by contractors who are bound to both the Ironworkers Provincial Agreement and the Millwrights Provincial Agreement. (See, *Comstock*, *supra* and the reasons set out therein as they relate to the scope of the order.)

We also note that in *Comstock Canada*, [1993] OLRB Rep. Aug. 740, the Board disposed of the jurisdictional dispute complaint involving the Ironworkers, the Millwrights District Council of Ontario, and Millwrights, Local 1244 and 1592 as follows:

14. Accordingly, the Board granted the relief sought in paragraph 1 of Tab 1 of the Ironworkers' Brief. To recite it here, we order that:

all construction work in connection with installation, erection, dismantling, alteration or relocation of material handling systems inclusive of all types of conveyor systems, machinery and/or equipment including the off-loading, rigging, handling, placement, alignment, levelling, securing and adjusting thereof at the Campbell Soup Company Limited, Chatham, Ontario should be assigned to a crew consisting of equal numbers of members of Ironworkers, Local 700 and Millwrights Local 1244, performing all work functions interchangeably.

15. Our order will be binding upon all the parties before us, including the employer, Comstock Canada, the Millwrights District Council of Ontario, Millwrights Locals 1244 and 1592, all applicants, and in addition, upon the two employer organizations which were named in the application as parties which might be affected by the application, and to which notice of the proceedings was provided, namely the Ontario Erectors Association, Incorporated and the Association of Millwright Contractors of Ontario. Further, pursuant to section 93(2) of the Act, our order is to be binding as well upon all other jobs undertaken in the future in Board Area #1. The orders in this paragraph apply to assignments where the contractor is bound to both the Ironworkers' Provincial Agreement and the Millwrights' Provincial Agreement.

16. We wish to emphasize and make clear that our order is not intended to affect in any way any pre-existing claims for the work in question by other trades, but is only to determine the correct assignment as between the two trades before us.

17. We made our direction effective with respect to all future jobs in Board Area #1 for several reasons. This has been a festering and continuing dispute between the trades, and has reappeared, under different guises, several times before the Board. The parties are obviously still unable to resolve amongst themselves this dispute, and it is essentially the same dispute occurring over and over again. In its materials, the Ironworkers raised this aspect of the dispute and asserted that it was an abuse of Board proceedings for the Millwrights to continue to challenge the correctness of an assignment based upon a composite crew. The Ironworkers specifically claimed the relief we have given.

18. In *Inplant Contractors Incorporated* (Board File 2827-90-JD), the Board had to decide whether or not to terminate a jurisdictional dispute between the same two parties over similar work, because the grievance had been settled. That case arose prior to the amendments to the Act. The Board wrote as follows:

Practically speaking, this dispute ought not to come before the Board again, given the proceedings and the decision in *Acco*, and given the material disclosed in the Briefs before us. We would have thought that the decision in *Acco* would resolve this dispute in Board Area #1. More particularly, the Millwrights ought to think seriously and at some length before bringing another jurisdictional dispute, or fostering one, of the nature of the one before us, where their request is for other than a fifty-fifty composite crew in Board Area #1, of the sort directed by the Board in *Acco*.

19. The significance of the *Inplant* decision lies not in the fact that another similar dispute, the instant proceeding, has come before the Board, but in the fact that it demonstrates that the dispute in Board Area #1 has existed for some time and continues to exist. Where the materials filed disclose such a continuing dispute, and the materials enable the Board to determine the correct assignment, the Board may issue remedies that will settle the dispute beyond the particular work assignment.

6. In their intervention, the Millwrights submit that the grievance herein is inarbitrable because the Ironworkers are asking the Board to enforce the order made in *The State Group Limited*, *supra*, and the Board is without jurisdiction to enforce its own orders, and that because the dispute raised by the grievance is a jurisdictional dispute it is not arbitrable as a grievance. The Millwrights submit that they are entitled to participate in this proceeding because an order, namely, the one made in *The State Group Limited*, *supra*, has been placed in issue.

7. The responding employer, E. S. Fox Limited, responds to the application as follows:

7. The responding party responds to the referral as follows:

The Responding Party E.S. Fox Limited takes the position that the grievance is not arbitrable before the Ontario Labour Relations Board.

At all material times, the Responding Party E.S. Fox Limited complied with the

applicable collective agreements between the Applicant and the interested party and the relevant area practice as enunciated in Labour Relations Board decisions.

8. In support of its response, the responding party relies on the following material facts:

The Responding Party E.S. Fox Limited was hired by the owner on a time and materials basis to provide men to install equipment provided by the owner and the manufacturer at the owner, Atlas Tubes' Manufacturing operation in Harrow, Ontario. The Responding Party E.S. Fox Limited commenced layout work at the site as instructed by the owner with a crew composed of one Millwright, skilled in the performance of the operation of optical alignment equipment, name specified by the owner to perform the work. A Millwright Apprentice was engaged locally to assist in the work.

The Company was originally engaged to install and align production machinery comprising an uncoiler, a forming and welding process mill and the related travelling cut off saw. The equipment involved is a production process mill and not a conveyor or material handling line. The owner used its own employees and employees of Moir Crane, members of the Ironworkers union, to off-load all of the equipment and move it into the building. On or about January 31, E.S. Fox Limited was asked to supply men to perform work that had previously been done by Moir Crane in what is known as the "bundler" area which involved the installation of approximately 150 feet of a conveyor system. All work in the bundler area was performed with a crew composed of equal numbers of Ironworkers and Millwrights, save and except for employees performing optical alignment work. All optical alignment work was performed by Millwrights. The Applicant Ironworkers were unable to provide qualified employees.

Further, at the hearing on April 22, 1994, E. S. Fox Limited submitted that, it is not bound by the decision and orders made in *The State Group Limited, supra*, and, further, that the work which is the subject of this grievance is not the same as the work in dispute in that case in any event. E. S. Fox Limited also submitted that, to the extent that the Ironworkers seek to have the orders in *The State Group Limited, supra*, enforced, the Court is the proper forum, not the Board.

8. The Ironworkers submits that the issue in this proceeding is whether E. S. Fox Limited has violated its collective agreement. The Ironworkers submits that the order made in *The State Group Limited, supra*, applies, but argues that this is not an enforcement proceeding as such, but rather a proceeding with respect to an alleged violation of a collective agreement.

9. Sections 126 and 93(1) of the *Labour Relations Act* provide that:

126.-(1) Despite the grievance and arbitration provisions in a collective agreement or deemed to be included in a collective agreement under section 45, a party to a collective agreement between an employer or employers' organization and a trade union or council of trade unions may refer a grievance concerning the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable, to the Board for final and binding determination.

(2) A referral under subsection (1) may be made in writing in the prescribed form by a party at any time after delivery of the written grievance to the other party, and the Board shall appoint a date for and hold a hearing within fourteen days after receipt of the referral and may appoint a labour relations officer to confer with the parties and endeavour to effect a settlement before the hearing.

(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 45 (6.3), (8), (8.1), (8.3) and (9) to (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

(4) The expense of proceedings under this section, in the amount fixed by the regulations, shall be jointly paid by the parties to the Board for payment into the Consolidated Revenue Fund.

93.- (1) This section applies when the Board receives a complaint,

- (a) that a trade union or council of trade unions, or an agent of either was or is requiring an employer or employers' organization to assign particular work to persons in a particular trade union or in a particular trade, craft or class rather than to persons in another; or
- (b) that an employer was or is assigning work to persons in a particular trade union rather than to persons in another.

It is not unusual for a construction industry grievance to raise what is essentially or substantially a jurisdictional dispute. The purpose of section 126 of the *Labour Relations Act* is to provide an expeditious mechanism for resolving collective agreement disputes in an industry where the nature of the work and the structure of labour relations often render ineffectual the usual arbitration provisions found in collective agreements. Section 93 of the Act is specifically designed to be the primary means by which jurisdictional disputes are resolved. Consequently, while there may be cases in which it is not necessary or appropriate to do so, the Board will generally not arbitrate a grievance which raises a jurisdictional dispute until a jurisdictional dispute complaint has been filed and determined. Indeed, where a section 93 complaint has been filed or is contemplated with respect to the same assignment of work which is the subject of the grievance which has been referred to the Board, the Board will generally defer consideration of the grievance pending the resolution of the jurisdictional dispute. In determining that that is the appropriate way to proceed, the Board need not be satisfied that the resolution of the jurisdictional dispute will be completely dispositive of the grievance.

10. In this case, the Ironworkers grieves that E. S. Fox Limited has violated its collective agreement. That is a matter for arbitration. However, the basis of the grievance concerns an assignment of work which the Ironworkers alleges was improperly made. In other words, the grievance raises a dispute concerning an assignment of work; that is, a jurisdictional dispute. That jurisdictional dispute is between the Ironworkers and the Millwrights. Both legally and practically, section 93 of the *Labour Relations Act* provides a proper mechanism for resolving such a jurisdictional dispute (and such an approach to the fundamental issue raised by the grievance is consistent with the views expressed in *C.U.P.E. v. CBC* by the Ontario Court of Appeal (1990) 70 DLR (4th) 175, 38 OAC 231, 90 CLLC paragraph 14025) and the Supreme Court of Canada [1992] 2 SCR 7. Further, even if this grievance could be characterized as an "order enforcement" proceeding, it is not at all clear that the Ironworkers could proceed to Court without first obtaining a Board Order under section 126, which in our view it cannot obtain without a determination of the jurisdictional dispute.

11. In the result, the Board is satisfied that this proceeding should be adjourned *sine die* pending the filing and disposition of a jurisdictional dispute complaint under section 93 of the *Labour Relations Act*. If no jurisdictional dispute complaint is filed within one year of the date hereof, and the matters in dispute between the parties are not otherwise resolved or disposed of, the grievance will be dismissed as having been abandoned.

3603-93-JD Ontario Sheet Metal Workers' & Roofers' Conference; Sheet Metal Workers' International Association, Local 397, Applicants v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508; **E. S. Fox Limited**, Responding Parties

Construction Industry - Jurisdictional Dispute - Sheet metal workers' union and Plumbers' union disputing assignment of work in connection with piping for dust control system - Board satisfied that work correctly assigned to Sheet metal workers' union

BEFORE: *Robert Herman*, Vice-Chair, and Board Members *M. M. Vukobrat* and *H. Kobryn*.

APPEARANCES: *J. Raso* for Sheet Metal Conference and *Tim Fenton* for Sheet Metal Workers', Local 397; *Laurence C. Arnold* and *Robert Vosper* for U.A. Local 508; *W. J. McNaughton* and *B. Royal* for E. S. Fox.

DECISION OF THE BOARD; May 9, 1994

1. This is a jurisdictional dispute filed pursuant to the provisions of section 93 of the *Labour Relations Act*.
2. The Board delivered the following oral decision at the conclusion of the consultation held in this matter:

"We are satisfied that the assignment was correctly made by E. S. Fox Limited.

This work in dispute was piping, but it was piping for a dust control system.

The trade agreement relied upon by the U. A. has no application to the work here, because on its face the agreement does not apply to such work. Even if it did, we are satisfied that the prevailing practice was not to follow the trade agreement, but to award such work on dust control systems to Sheet Metal Workers.

Accordingly, the assignment as made will stand."

3899-93-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Applicant v. Glazier Medical Centre, Responding Party v. Group of Employees, Objectors

Adjournment - Bargaining Unit - Certification - Practice and Procedure - Reconsideration - Employer operating private medical centre - Board earlier finding nurses' bargaining unit to be appropriate for collective bargaining and determining that ONA to be issued certificate - Employer seeking reconsideration of that decision - CAW subsequently applying for certification in respect of all-employee unit excluding nurses - In CAW application, employer proposing all-employee unit (with no exclusion for nurses) or, alternatively, one excluding medical technologists and technicians as well as nurses - Certain employees supporting employer's alternative position on bargaining unit - Board declining to adjourn CAW application pending reconsideration decision in respect of ONA application - Board finding CAW's proposed bargaining unit appropriate - Certificate issuing - Employer's reconsideration application in respect of CAW application dismissed

BEFORE: *S. Liang*, Vice-Chair, and Board Members *J. A. Rundle* and *B. L. Armstrong*.

APPEARANCES: *Raj Dhaliwal* for the applicant; *Jason Hanson*, *Irene Wolfe* and *David Russell* for the responding party; *Linda Barry* and *Monique Gauthier* for the objectors; *Sharon Faulds* for Ontario Nurses Association.

DECISION OF THE BOARD; May 24, 1994

1. This is an application for certification in which by brief written decision dated April 19, 1994, the Board certified the CAW for the following bargaining unit:

all employees of Glazier Medical Centre in the City of Oshawa, save and except physicians, registered and graduate nurses employed in a nursing capacity, assistant administrators, supervisors, and persons above the rank of assistant administrator and supervisor.

2. We now provide our reasons for our determination with respect to the bargaining unit.

3. This application was made on February 14, 1994. Previously, on February 3, 1994, the Ontario Nurses' Association also made an application for certification with respect to a unit of employees (the registered and graduate nurses) employed by the Glazier Medical Centre ("the employer" or "the Centre"). On March 22, another panel of the Board considered the application by the ONA, found that the parties had agreed to a bargaining unit description consisting of the registered and graduate nurses, found having regard to this agreement that this bargaining unit was appropriate for collective bargaining and determined that subject to clarification of the proper legal name of the Centre, the ONA was to be issued a certificate (*Glazier Medical Centre*, Board File No. 3780-93-R dated March 22, 1994 as yet unreported), [now reported at [1994] OLRB Rep. Mar. 249].

4. By letter dated March 29, the Centre applied for reconsideration of the decision in Board File No. 3780-93-R.

5. On April 18, the parties to this application for certification appeared before this panel to hear and determine the outstanding issues with respect to this matter.

6. Prior to April 18, counsel for the Centre wrote to the Board requesting that the Board adjourn the hearing of this matter, pending the determination of the request for reconsideration.

After considering the written submissions of the Centre and of the applicant, the Board (differently constituted) refused this adjournment.

7. On April 18, the Centre renewed its request that the Board adjourn the hearing in this matter. After hearing the submissions of the parties, the Board once again refused the adjournment. The Board saw no reason to delay the disposition of the application before us until the panel deals with the reconsideration request in Board File No. 3780-93-R. The decision in Board File No. 3780-93-R is a presumptively valid and final determination by the Board on the matters contained therein. Further, the parties which are affected by the application before us, in which we include the applicant and the employees in this workplace, are presumptively entitled to have their rights determined in an efficient and speedy manner by the Board.

8. In requesting an adjournment of this matter, the Centre, in essence, wishes to suspend the effect of that prior decision as they affect the litigation of the matters before us. This is because in the application before us, the Centre takes the position that the appropriate bargaining unit should include the nurses which were the subject of Board File No. 3780-93-R. Having reviewed that decision and the written submissions made by the Centre in support of its request for reconsideration, it is far from clear to us that there are any compelling labour relations reasons for the Board to delay its disposition of the application before us because of that reconsideration request or to treat the decision in Board File No. 3780-93-R as anything but final and conclusive. Although there may be cases where it may be reasonable to do otherwise, we do not find this to be such a case.

9. As we stated above, another panel of the Board has determined that the ONA is entitled to represent for collective bargaining purposes, a group of registered and graduate nurses employed by the Centre. To the extent that the Centre proposes that the unit for which this applicant ("the CAW") seeks certification *include* these nurses, clearly this would not be appropriate. Although (for reasons unknown to us) the Board had not as of April 18 sent a formal certificate to the parties in Board File No. 3780-93-R, there has been a determination that the ONA is to be the bargaining agent of the registered and graduate nurses. To include the nurses in another bargaining unit represented by another bargaining agent would be inconsistent with this determination and inconsistent with the concept of exclusive bargaining agency which is contained in the Act.

10. [Since the April 18 hearing before this panel, the Board has now released its decision on the request for reconsideration in Board File No. 3780-93-R (on April 27, 1994), denying that request.]

11. The remaining dispute between the parties concerns the inclusion of a group of medical technologists and technicians. The bargaining unit proposed by the CAW is the following:

all employees of Glazier Medical Centre in the City of Oshawa, save and except medical physicians, registered and graduate nurses, assistant administrators, supervisors and persons above the rank of assistant administrator and supervisor.

12. In the alternative to its position that the unit include the nurses, the Centre proposes that the unit exclude classifications listed as Registered Technologists, X-ray Assistants, EKG/Phlebotomy, Registered X-ray Technicians, Registered Ultrasound Technologists, Registered Echo Technologists, and Lab Assistants. It is supported in this by a group of medical technologists and technicians who appeared before the Board to make representations on the bargaining unit issue. For ease of reference, the group of employees whom the Centre wishes to exclude from the proposed unit shall be referred to in this decision as the "medical technologists".

13. The Centre and the group of employees state that the medical technologists are professionals regulated by health professions legislation. Employees in these classifications do not have any functional overlap in their work with the office and clerical personnel that form the bulk of the proposed unit. There is no overlap of work, there is a separate line of supervision, and they work in discrete areas of the medical centre. The exclusion of the medical technologists will cause no labour relations difficulties because of the clear lines of demarcation between the groups. There will, for instance, be no artificial barriers to job opportunities nor potential for jurisdiction dispute issues to arise. In fact, it is asserted, there is much more overlap between the nurses' duties and the duties of the clerical staff than as between the medical technologists and the clerical staff.

14. The concerns of the medical technologists and the office and clerical staff are very different. The medical technologists must be licensed by its regulating body. Malpractice insurance is an important concern. Health and safety issues are also important concerns since the technologists often deal with highly infectious patients and body fluids. The technologists are involved in continuing education. There is a different company policy respecting job postings for the medical technologists and for the office and clerical staff. There is also a different notice requirement for termination of employment by an employee. There is a different pay scale.

15. In sum, it is asserted that the bargaining unit proposed by the CAW will cause serious labour relations problems because of the great differences in the interests of the medical technologists and the other employees in the proposed unit.

16. In response, the CAW did not take serious issue with the facts as set out by the Centre and by the group of employees. It submits that it is not unusual for a union to represent a very diverse group of employees in one unit, including employees who have special licenses. For instance, the CAW represents bargaining units which include licensed electricians and professional engineers. The Board's cases are replete with references to large bargaining units containing employees with very different interests. The bargaining process is capable of dealing with these problems.

17. Having considered the facts and submissions relied upon by the Centre and by the medical technologists, we were satisfied and found that the bargaining unit proposed by the CAW is appropriate for collective bargaining, and issued a certificate accordingly.

18. In a recent decision, the Board reviewed the nature of its task in determining an appropriate bargaining unit, in *The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85). In that decision, the Board stated:

18. Several years ago, in *Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266, the Board undertook a review of its traditional approach to bargaining unit determination. The Board noted at paragraph 14:

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system

can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal “inside workers” (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board’s decision in *The Regional Municipality of Durham*, Board File 1818-84-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, where the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost “class”) divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is “inappropriate” to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

The Board signalled its intention to be more flexible and forensic about bargaining unit structure, then went on to say:

... We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

[emphasis added]

If the unit applied for meets that simple test, it serves no purpose to litigate or consider alternative bargaining unit configurations.

19. Both in *Hospital for Sick Children* and in later cases, the Board has explored the tension between bargaining structures that facilitate organizing (one of the goals of the Statute), and bargaining structures that are likely to be more stable and effective in the long-run (another goal of the Act). The former objective points to smaller employee groupings which are more readily organized. The latter goal points to broader-based bargaining units that have the organizational mass and bargaining power to survive over time and in changing market conditions.

20. These goals must be harmonized within a framework that now recognizes that there is no single unique and indisputably “appropriate” unit. There are degrees of appropriateness; or to put the matter another way, sensible, alternative ways in which one can define the bargaining unit without triggering (as the Board in *Hospital for Sick Children* put it) “serious labour relations problems”. A trade union need not seek to represent the *most* comprehensive or *most appropriate* bargaining unit; and as the applicant or moving party, the union has a degree of flexibility in deciding what unit to organize. As long as the unit it seeks does not generate serious labour relations difficulties for the employer, it will be granted the unit it applies for.

21. If there is one theme that has been constant in the Board’s concerns, both before and after *Hospital for Sick Children*, it is the aversion to fragmentation: the sub-division of an employer’s enterprise into a number of separate collective bargaining components - which become separate seniority districts, which can lead to jurisdiction or inter-employee rivalries, which can generate organizational problems if one or other fragment goes on strike, which can make work-sharing or technological change more difficult to accommodate, and so on. Accordingly, while smaller sub-divisions may be appropriate in the context of a particular case, and may be necessary to

facilitate organizing (despite the collective bargaining “downside” described above), a broader, more comprehensive unit will *also* generally be appropriate. In other words, if a trade union seeks a *more* comprehensive bargaining unit, this larger unit will usually be appropriate, and will very likely be accepted on the *Hospital for Sick Children* test, unless there are serious labour relations problems with it which *demonstrably* overwhelm the difficulties associated with fragmentation, or unless the larger unit applied for seems idiosyncratic or perverse. Indeed, unless the labour relations context is quite unusual, one would expect the more comprehensive bargaining unit to be presumptively appropriate, if that is what the union has organized and applied for; and it serves no purpose to engage in the exercise mentioned in the emphasized portion of the *Hospital for Sick Children* case reproduced at paragraph 18.

19. More recently, in *Burns International Security Services Limited*, Board File No. 3340-93-R dated April 7, 1994, as yet unreported, [now reported at [1994] OLRB Rep. April 347] the Board once again reviewed the “Sick Kids” test, stating:

If the unit applied for meets that simple test, it serves no purpose to litigate alternative bargaining unit configurations, nor does the term “community of interest” usually provide much guidance to what is an appropriate bargaining unit. All employees share a “community of interest” by virtue of working for the same employer, and “real life collective bargaining” seems to be able to accommodate groups with quite different duties and conditions, who one might still argue had a separate “community of interest”.

20. We agree with the views expressed in the above cases. We are satisfied that the group of employees whom the union seeks to represent in the case before us would not generate serious labour relations difficulties for the employer, even accepting the various factors as outlined by the parties which distinguish the two groups of employees. This unit is neither more diverse nor broader in scope than other units with which the Board is familiar, in municipalities, in hydro companies, and in various other workplaces, including units which have been newly created as a result of Board orders under section 7 of the Act. The portion of the unit excluding the medical technologists already includes such diverse employees as maintenance, switchboard and account clerk. The unit which the union seeks to represent encompasses a definable, stable group of employees working at a single location. We are satisfied that to the extent there are differences amongst the employees in this unit, they are differences which are capable of being accommodated within the collective bargaining process.

21. The Board also determines that the exclusion of registered and graduate nurses from this unit should be expressed in wording which mirrors the wording of the unit represented by ONA, adding the words “employed in a nursing capacity” to the bargaining unit description proposed by the applicant.

22. For the above reasons, the Board by decision dated April 19, 1994 found the unit set out in para. 1 above to constitute a unit of employees of the responding party appropriate for collective bargaining, and issued a certificate to the applicant.

23. Prior to the release of our reasons above, the Board received a letter from counsel for the employer dated April 29, 1994 requesting reconsideration of our decisions to 1) refuse the adjournment, and 2) grant the certificate to the applicant. This request is made pursuant to section 108(1) of the *Labour Relations Act* which states:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any deci-

sion, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

24. Although this section gives the Board a broad power to reconsider its decisions, the Board has stated that both section 108(1) and the realities of labour relations dictate that the premise from which the Board must begin is that its decisions should be final and conclusive for all purposes: see, for instance, *Ontario Hydro*, [1993] OLRB Rep. May 442. As the Board stated in that case:

... the Board will not usually reconsider a decision unless an obvious error is identified; or a request for reconsideration raises important policy issues which have not received adequate attention or consideration; or the party requesting reconsideration proposes to present new evidence which it could not, with the exercise of due diligence, have obtained and presented previously, and which new evidence would, if accepted, have a material impact on the decision in question; or that a party seeks to make representations which it has had no previous opportunity to make.

25. The Board is satisfied that the arguments advanced in this request for reconsideration do not raise any of the circumstances which might warrant reconsideration. Nevertheless, we will address a few of the matters raised, in our discretion.

26. The request to reconsider the Board's refusal of the employer's adjournment request is, in fact, the third time that this issue has been argued by the employer. On April 7, 1994, the employer requested that the Labour Relations Officer meeting and the hearing in this application be adjourned pending the result of the reconsideration request in Board File No. 3780-93-R. This request was denied by the Board in an endorsement dated April 12. The employer attended very briefly at the LRO meeting, and then withdrew. At the hearing before this panel on April 18, the employer renewed the request for the adjournment. The Board again refused this request, as set out in our reasons above.

27. The submissions made in this request for reconsideration do not cast any doubt on the correctness of our prior ruling on this issue, and on the ruling of the panel on April 12, and amount to re-argument of the matter on which the Board has already ruled.

28. The employer also submits that the applicant has not demonstrated membership support of more than fifty-five percent as required under section 9.1(2) of the Act. It states that the list of employees submitted by the employer disclosed a total of 129 employees, 109 of whom were at the relevant dates within the bargaining unit. This is not accurate. These lists disclosed a total of 129 employees, 93 on Schedule "A" (those at work on the certification application date) and 36 on Schedule "B" (those not at work on the certification application date). Of these 129 employees, 102 were determined by the Board to be employees in the bargaining unit on the certification application date (including employees who although not *at work* on that date, met the Board's "30/30 rule".) Of these, 60 employees were or had applied to become members on or before that date.

29. The employer submits that the Board ought to exercise what it terms a "residual mechanism" to order a representation vote even where the union has demonstrated membership support of over fifty-five per cent. It describes the circumstances of this case as exceptional enough to warrant the exercise of this mechanism. We are satisfied that there are no reasons to invoke the exercise of the Board's discretion in the case before us. There is no suggestion that the membership evidence is unreliable. The existence of a group of employees opposed to certification is not in itself grounds for the ordering of a vote.

30. The employer asserts also that “the Board should have granted the Responding Party an opportunity to address the challenges made to the Employee Lists by the CAW given that the Board refused to grant the Responding Party’s request for an adjournment pending the outcome of the application for reconsideration on the ONA application”. At the outset of the hearing, the Board indicated its understanding that the only remaining issue in dispute in this application was the appropriateness of the bargaining unit sought by the applicant. The Board invited the parties to make representations regarding the bargaining unit issue and, as well, to identify whether there were any additional issues in dispute. The employer raised the question of an adjournment, which we have dealt with above. There was no suggestion by the employer that it wished to take issue with the applicant’s challenges to the list. In any event, the applicant’s challenges were all based on the inclusion on the list by the employer of registered and graduate nurses, which, as we have indicated earlier, was addressed by the employer by way of its adjournment request. Even assuming therefore, that the Board would have been inclined to permit the employer to raise issues which had not been brought to the attention of the other parties during the LRO meeting, the employer had the full opportunity at the hearing before this panel to make any submissions regarding any outstanding issues.

31. For all of these reasons, the request for reconsideration is dismissed.

0048-94-R Service Employees Union International Union, Local 532 Affiliated with the A.F. of L., C.I.O., C.L.C., Applicant v. **Guelph Rest Home** Incorporated c.o.b. as Heritage House Retirement Home, Responding Party

Bargaining Unit - Certification - Employer and union disputing whether bargaining unit had been agreed to in waiver process - Employer proposing bargaining unit excluding part-time employees and students - Board not conclusively determining whether bargaining unit had been agreed to, having concluded that union’s proposed unit appropriate - Board further finding that employer’s position on bargaining unit untenable given language of section 6(2.1) of the Act - Certificate issuing

BEFORE: *Pamela Chapman*, Vice-Chair, and Board Members *W. A. Correll* and *K. Davies*.

DECISION OF THE BOARD; May 9, 1994

1. This is an application for certification filed on April 7, 1994. A response to the application was filed on April 14, 1994.

2. Following its normal procedure, the Board contacted the parties to canvass their respective positions regarding all issues arising out of the case. After telephone conversations with each of the parties on April 21, 1994, the Labour Relations Officer assigned to the case reported that the parties had reached agreement on all issues in dispute, including the description of the bargaining unit, and had further agreed to waive their right to a formal hearing. The same day, representatives of both the applicant and the responding party signed a list of the employees indicating that it was the agreed list for the purposes of the count. That list included full-time, part-time and student employees of the responding party. In accordance with Board practice, the Labour Relations Officer then released the count to the parties and advised them that the applicant appeared to be in a certifiable position.

3. On April 27, 1994, one of the owners of the responding party, who was not the representative involved in discussions with the Labour Relations Officer, wrote to the Board indicating that he wished to appear at a hearing before the Board, to make submissions concerning the appropriateness of the bargaining unit proposed by the applicant. He took the position in that correspondence, and before the Board, that his representative, the on-site manager, had not agreed to the description proposed by the applicant, nor to a waiver of a formal hearing, in the discussions with the Officer.

4. The manager involved in the waiver process did not appear at the hearing of this matter, so we did not hear evidence of her recollection of the discussions with the Officer. However, the owner of the responding party submitted at the hearing that in effect a misunderstanding had occurred. He stated that the manager had not understood that by signing the list for the count she was agreeing to the unit description, and that she believed that she had not otherwise expressed any agreement to the applicant's proposed unit. He noted that the response filed by the responding party proposed a bargaining unit excluding part-time employees and students, and stated that the responding party had at all times intended to maintain this position as to the appropriate unit. The owner of the responding party did, however, acknowledge that the count was released to the manager after she agreed to the list of employees, and that she was then advised that the applicant was in a certifiable position.

5. It was the position of the applicant that the parties reached agreement on all issues relating to the application through discussions with the Labour Relations Officer, and that as a result the count was announced and both the meeting with the Officer and the hearing were waived.

6. As this Board has said in numerous decisions, the rules and procedures for the certification process have been established precisely in order to prevent the mischief of either party gerymandering the employee list or bargaining unit description so as to avoid or favour certification. As such, the Board does not announce the count of employees and union membership until the bargaining unit description is settled, either through a decision of the Board or by the agreement of the parties. For the same reason, parties are not permitted, in other than exceptional circumstances, to resile from an agreement on the description of the bargaining unit after the count has been released. (See *Santa Maria Foods*, [1981] OLRB Rep. Nov. 1618; *Fort Erie Duty-Free Shoppe Inc.*, [1991] OLRB Rep. Nov. 1268; *Cor Jesu Re-education Centre of Timmins Inc.*, [1992] OLRB Rep. March 298; *Glazier Medical Centre*, Board File No.3780-93-R, unreported, decision released March 22, 1994 [now reported at [1994] OLRB Rep. Mar. 249]).

7. In this case the responding party argues essentially that no agreement was reached on the description of the bargaining unit, and that as such they do not seek to resile, but only to take a position consistent with that taken in their response to the application. Given the report filed by the officer, the signatures of representatives of both parties on the employee list, the fact that the count was released, and in the absence of evidence from the manager who now asserts that she did not agree with the applicant's proposed unit, we would be inclined to find that an agreement on the appropriate bargaining unit was reached. As no exceptional circumstances have been advanced that would justify permitting the responding party to resile from this agreement, this would normally result in a determination that the unit agreed to is the appropriate one for collective bargaining purposes.

8. In the circumstances of this case, however, it is unnecessary for us to determine conclusively what was agreed to in the course of discussions with the officer, as we are satisfied that in

any event the unit applied for is an appropriate one, in contrast to the unit or units sought by the responding party. Section 6(2.1) of the Act provides that:

6.-(2.1) A bargaining unit consisting of full-time employees and part-time employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining.

9. It is the position of the responding party that both part-time employees and students should be excluded from the bargaining unit. The students employed by the responding party are in fact part-time employees as that term has been interpreted by the Board, as they work less than 24 hours per week during the school year rather than more than 24 hours during the school vacation period; indeed, each of the students in question in this application worked during the week immediately prior to this application for certification. Thus, the only objection raised by the responding party to the unit proposed by the applicant is the inclusion of part-time employees together with full-time employees in a single unit. Given the language of section 6 (2.1) of the Act, this position is simply untenable, and we find that the unit proposed by the applicant is the appropriate unit for collective bargaining purposes pursuant to section 6 of the Act.

10. The Board finds that the applicant is a trade union within the meaning of section 1(1) of the *Labour Relations Act*.

11. The Board further finds that all employees of Guelph Rest Home Incorporated c.o.b. as Heritage House Retirement Home in the City of Guelph, save and except supervisors, persons above the rank of supervisor, registered nursing staff, program Director and office and clerical staff, constitute a unit of employees of the responding party appropriate for collective bargaining.

12. In accordance with the Rules of Procedure respecting applications for certification, the named employer has filed a list of employees in the bargaining unit, together with sample signatures for the employees on that list.

13. In support of its application for certification, the applicant union filed documentary evidence of membership in the form of cards. The cards are signed by each employee concerned and indicate a date within the six-month period immediately preceding the application date. The membership evidence is supported by a duly completed Declaration Verifying Membership Evidence.

14. The Board is satisfied on the basis of all of the evidence before it, that more than fifty-five per cent of the employees of the responding party in the bargaining unit on April 7, 1994, the certification application date, had applied to become members of the applicant on or before that date.

15. A certificate will issue to the applicant.

16. At the meeting with the Labour Relations Officer, the parties agreed that the style of cause in this matter should be amended to reflect the correct name of the responding party: "Guelph Rest Home Incorporated c.o.b. as Heritage House Retirement Home". Subsequently, correspondence was received from the owners of the responding party indicating that the name should be further amended to "Guelph Rest Home Partnership". It appears from this correspondence that Guelph Rest Home Incorporated is a general partner in the partnership. Thus, the partnership is one step further removed from the business name with which employees and the community are familiar, that of "Heritage House Retirement Home". The Board is concerned in choosing an appropriate name in which to issue a certificate to identify a legal corporate entity and also to ensure that the name of the employer is one that its employees will recognize. For our purposes,

then, we are satisfied that the appropriate name in which to issue the certificate in this matter is "Guelph Rest Home Incorporated c.o.b. as Heritage House Retirement Home".

0268-94-R Teamsters Local Union 938, Applicant v. Knob Hill Farms Limited, Responding Party v. Group of Employees, Objectors

Certification - Pre-Hearing Vote - Union applying for certification and requesting pre-hearing vote - Employer submitting that Board without jurisdiction to direct vote and requesting hearing to deal with issue prior to vote being held - Board declining employer's request, directing that pre-hearing vote be taken, and that ballot box be sealed pending disposition of issues in dispute

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *R. M. Sloan* and *H. Kobryn*.

DECISION OF THE BOARD; May 13, 1994

1. This is an application for certification.
2. The applicant has requested that a pre-hearing representation vote be taken.
3. It appears to the Board on an examination of the records of the applicant and the records of the responding party that not less than thirty-five per cent of the employees of the responding party in the voting constituency hereinafter described were members of the applicant at the time the application was made.
4. By correspondence dated May 9, 1994, the respondent has taken the position that the Board has no jurisdiction to direct a pre-hearing representation vote until after it has made a determination as to the effect of certain revocations of membership evidence on the trade union's level of support. It has requested a hearing to deal with this issue prior to the vote being held.
5. The Board declines to grant the respondent's request. The purpose of the pre-hearing vote is to test the wishes of employees without delay and upon the *appearance* of 35 per cent support in the bargaining unit. Issues that may affect the ultimate disposition of the application, including whether or not there was, in fact, adequate membership evidence so as to justify the taking of the vote may be dealt with at any subsequent hearing. (See for example, *Ontario Hydro*, [1987] OLRB Rep. Dec. 1589.) This principle applies with equal force to a request that a hearing should be held to enable a party to convince the Board that its traditional approach to section 9(2) is no longer well founded.
6. Accordingly, the Board directs that a pre-hearing representation vote be taken of the employees of the responding party in the following voting constituency:

all employees of Knob Hill Farms Limited at 1250 South Service Road, Mississauga, save and except Assistant Store Managers, persons above the rank of Assistant Store Manager and office and clerical staff.
7. All those employed in the voting constituency on April 21, 1994, who are so employed on the date the vote is taken will be eligible to vote.

8. Voters will be asked to indicate whether or not they wish to be represented by the applicant in their employment relations with the responding party.
 9. Having regard to the respondent's submissions, the ballot box will be sealed pending the disposition of the issues in dispute.
 10. The matter is referred to the Registrar.
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0899-92-U Jose Martins, Applicant v. Labourers' International Union of North America, Local 527, Responding Party

Construction Industry - Duty of Fair Representation - Duty of Fair Referral - Unfair Labour Practice - Applicant alleging that union caused him to lose job by grieving against his employer and disrupting the work site with overly frequent visits by business representatives in furtherance of campaign against him - Complaint dismissed

BEFORE: *K. G. O'Neil*, Vice-Chair.

APPEARANCES: *Phillip G. Hunt* for the applicant; *A. M. Minsky* and *B. Carrozzi* for the responding party.

DECISION OF THE BOARD; May 9, 1994

1. This is a complaint pursuant to section 91 of the *Labour Relations Act*, alleging breaches of sections 69 and 70. The complainant Mr. Jose Martins alleges that the union has caused him to lose his job by grieving against his employer and disrupting the work site with overly frequent visits from the business representatives, in furtherance of a campaign against him which has gone on since 1990. The union denies these allegations and says that it acted within its constitution and obligations under the Act, and that it did not cause Mr. Martins' misfortune.
2. The litigation of this complaint consumed 17 days of hearing. I heard the evidence of the following witnesses: On behalf of the complainant, Jose Martins, the complainant, and Frank Stolle, Construction Manager for Eastern Construction. On behalf of the respondent: Daniel Randazzo, counsel to Local 527 during the period in dispute, Pat Strizzi, a Business Representative for the local, Carlo Trunzo, the dispatcher at the union hall and Andre Roy, Local President.
3. I will summarize the most important parts of the evidence rather than setting it out in full, but I have carefully considered it all, even if it does not appear in these reasons. I have indicated necessary resolutions of conflicting evidence, and the basis for them.
4. There are about 2700 members of Local 527, and its geographical jurisdiction takes in Ottawa and surrounding areas. The local operates a hiring hall, pursuant to various collective agreements and a set of internal rules about the order of referral to available work of members in good standing on the out-of-work list. In July, 1989, Jose Martins became a member of the Local executive and was appointed to the Ontario District Council as a delegate. At about this time, he was also referred through the union's hiring hall to jobs on the Trans Canada Pipeline, at sites

between Brockville and Niagara. The complainant alleges this was done with a view to ensuring that he would miss meetings of the executive and other bodies to which he was appointed.

5. In January, 1990, Mr. Martins and his family started receiving anonymous phone calls, which he attributes to members of the union executive, since his phone number was unlisted and known only to close acquaintances, including members of the union executive and the dispatcher at the hiring hall.

6. In July 1990, Mr. Martins started working for Eastern Construction in Belleville under Frank Stolle. This site is outside the geographical jurisdiction of the Ottawa local, a fact which led to later difficulties and disputes between Mr. Martins and the local over the manner of the referral, the payment of his vacation pay, and his ability to carry out the duties of his position on the executive. As to the latter matter, on July 18, October 17 and December 19, 1990, Mr. Martins did not attend executive meetings and asked to be excused. Disputes arose over whether he had properly requested authorization to be excused, and/or been properly or officially excused.

7. In January, 1991, Mr. Martins was charged under the union constitution in reference to his absences from executive meetings and his working outside the jurisdiction of the Ottawa local. On January 24, 1991, Mr. Martins alleges that the union attempted to have him discharged from his job with Eastern Construction, as the penalty sought in the charges preferred against him under the union constitution was removal of membership, which would have meant he could not work on a union job.

8. On January 26 and February 11, 1991 there was a Local Union Trial with the result that Mr. Martins' membership rights were restricted. These internal union proceedings, together with a second set of charges and trials in 1992, are also the subject of proceedings in civil court. I agreed to hear evidence about them as background to the matters alleged under the *Labour Relations Act*.

9. On February 27, 1991 Local 527's trust fund returned the company contributions relating to Martins' work in Belleville because he was not working in Local 527's jurisdiction. In the accompanying letter, reference was made to a mechanism to have the Kingston/Belleville local union's trust fund accept the contributions, and then have them transferred to the Local 527 fund. Mr. Martins believes that the local was just making trouble for him, and this was done to negatively affect his employment relationship.

10. On July 23, 1991 an appeal to the International Union from the February 1991 trial decision was held in Chicago, Illinois. The resulting decision on July 29, 1991 meant that Mr. Martins was removed from his position on the executive, but retained his membership in the local, and therefore his right to be referred by the hiring hall. In the Fall of 1991, and again in January, 1992, Martins' then counsel wrote to the International Executive protesting the decision and asking them to review it to avoid legal proceedings. Until October, 1991 when the job finished, Martins had continued to work in Belleville for Eastern Construction.

11. In January, 1992, Frank Stolle contacted Jose Martins at home as he wished him to work on a new Eastern Construction project on Sheffield Road in Ottawa. Mr. Stolle inquired if a referral slip was necessary and Mr. Martins said not, as he viewed it as a recall. Mr. Martins said in evidence that this was a misunderstanding of Article 15 of the Ottawa Local Appendix to the provincial labourers collective agreement in the ICI sector of the construction industry, which reads as follows:

15.01 When hiring, the Employer shall have the prerogative of first rehiring any employee who

has been in his employ during the preceding twelve (12) months of the date of rehire and such employee shall first obtain a referral slip from the Union.

Mr. Martins started work on January 27 without a referral slip. The complainant says it was common practice in the industry for labourers to get work on their own, particularly in a recall situation. The union would discover the fact that the man was working, and their interest would be served, says complainant's counsel, when contribution slips came in, at which point the name would be struck from the out-of-work list. Mr. Martins testified he had only taken a referral slip when he first worked for Eastern in 1976.

12. Shortly after Mr. Martins started working at the Sheffield Road site, Mr. Stolle asked for and was supplied with two more labourers from Local 527. These two men were engaged to do concrete forming work for a firm called Normco, to whom Eastern had subcontracted all the concrete and forming work necessary to the job. Eastern had an arrangement with Normco that it would supply union labourers to assist the carpenters working directly for Normco. Normco had a collective agreement with the carpenters and not with the labourers. Because of the time of night at which the dispatcher reached the two labourers, Demers and Martel, they started work the following morning without their referral slips. A business representative, Pat Strizzi, delivered the slips to the site the day after he heard about the job, but about a week after they had started work. This delivery of slips, when none was delivered to Martins, and the fact that the union did not grieve the fact that these two men started working without referral slips, is part of the complainant's case on discrimination.

13. On February 5, 1992 the union launched a grievance, drafted by their in-house counsel, Daniel Randazzo, against Eastern Construction. The grievance had two aspects to it. One was the arrangement Eastern had with Normco, and the other was the fact that Mr. Martins had been hired without being dispatched by the union hall and without a referral slip. Mr. Martins alleges that this grievance was for the purpose of "getting him off the job", that it was meant to and did result in his not working in the industry. It is one of the central allegations of the complaint, and includes with it the idea that the grievance about Normco's subcontract was nothing more than a convenient vehicle to continue the local's campaign against Jose Martins.

14. Mr. Martins was not notified about the grievance by the union, but Frank Stolle told him about it on February 14, at the latest, when it was partially resolved.

15. Business representatives visited the Eastern site on Sheffield Road between February 4 and March 6, for various purposes, including preparing for the potential arbitration hearing on the grievance, which was scheduled to be heard on March 9, 1992. Although there was some evidence from Mr. Martins and Mr. Stolle indicating that there were representatives on site earlier, I am persuaded that if so, it was not Mr. Strizzi or Mr. Trunzo, whose evidence on this point I found more reliable in that it was much more specific and clear than the other evidence on point.

16. A meeting relating to the grievance took place between representatives of the union and Eastern Construction on February 14, 1992, at which time the portion relating to Jose Martins was partially resolved. The agreement was that Mr. Martins would be laid-off on Friday, February 14, and be recalled on Monday, February 17 after Mr. Martins obtained a referral slip from the union hall. The union reserved the right to claim damages for the period of time in which Martins had worked without the referral slip, and the portion of the grievance relating to the arrangement with the sub-contractor was not resolved at that time. Mr. Martins was laid-off on the Friday and rehired on Monday, February 17 after obtaining a referral slip from the hall, pursuant to the agreement, with no loss of pay. On February 17, another labourer, Fequet, was referred to the Eastern site to improve the ratio of labourers to carpenters.

17. On February 19, 1992 there was a union meeting. Mr. Martins attended and complained about the grievance, and what he considered the differential treatment of the two other labourers whose referral slips had been brought to the site by the business representatives the same day that the grievance had been launched, as he viewed it, "against" him. Mr. Martins was called to order several times, without success, by Andre Roy, Local President, who was chairing the meeting. At one point in the meeting, Roy said that anyone who could not keep order in the meeting would be removed from the job, and then immediately corrected himself to say from the hall. Mr. Martins considers this a threat which was carried out by the local by arranging his termination on March 6, 1992. Mr. Martins tape recorded this meeting surreptitiously, which tape was part of the evidence before me. It shows that the Chair, Mr. Roy, eventually asked the Sergeant-at-Arms to escort Mr. Martins from the meeting. When Mr. Martins refused to go, Mr. Roy then said he would charge him under the Constitution if he did not leave as requested. Mr. Martins did not leave.

18. On March 3, and 5, 1992, there were further meetings between representatives of the union and Eastern, the second with a Labour Relations Officer, unsuccessfully attempting to settle the subcontracting and damages portion of the grievance. During the course of the period in which settlement discussions were going on, the union discovered a second non-union subcontractor, Advance Cutting and Coring, and that also became part of the settlement discussions.

19. The parties resolved the remaining portion of the grievance on March 6, 1992. Its terms included a payment of \$4,500.00 as damages for both the subcontracting violations of the collective agreement and the hiring of Mr. Martins without reference to the hiring hall. Mr. Martins alleges that there was an unwritten term of the settlement to fire him, which all of the union witnesses deny and Mr. Stolle had no knowledge of.

20. Mr. Martins was laid-off on March 6, 1992. Mr. Martins says this was a discharge arranged by the union as part of its final settlement of the grievance. Mr. Stolle of Eastern Construction, a witness called by the complainant, testified that this was a general lay-off caused by the temporary cessation of work on the project, and had nothing to do with the union. Mr. Martins nonetheless believed it to be a phoney lay-off to cover the deal to get rid of him. There is an important lack of congruity in the evidence of Mr. Martins and Mr. Stolle as to what was said between them on March 6, which I will deal with below.

21. Mr. Martins did not ask the union to grieve his lay-off or lack of recall, because he did not think they would file a grievance even if he asked.

22. On March 18, 1992, further charges were laid against Mr. Martins under the Constitution by Mr. Roy, including allegations of disrupting the February 19, 1992 meeting referred to above. On March 27, 1992 Mr. Martins launched a civil lawsuit against members of the union leadership. A Trial Board held a hearing concerning the charges against Mr. Martin on April 6, 1992 and communicated its decision against him in a letter he received apparently on April 16, 1992. The latter details are recited in a May 8, 1992 letter from the complainant's counsel appealing the conviction under the Constitution.

23. The complaint before me which was originally framed under section 70 as an allegation of unfair referral, alleges that from March 1992 onwards, other labourers were referred to work ahead of Mr. Martins, despite his higher position on the out-of-work list. As noted in the June 21, 1993 interim decision in this matter, by the end of the complainant's case, the allegations concerning other labourers had been limited substantially, and evidence was not called on the many other allegations in the pleadings dealing with unfair referrals. The remaining allegations about other labourers relate to the lay-off of Martins before others on March 6, 1992, when there was work available he could have performed, and 24 situations where labourers went to work for other con-

tractors without referral slips. In these 24 cases, the union did not file a grievance against the employer, as they did in the case of Eastern's hiring of Jose Martins without a referral slip. Counsel made it clear that these other allegations were part of the proof that Martins' March 6 lay-off was orchestrated by the union.

24. Mr. Stolle testified that the Sheffield Road job was basically shut down between March 10 and 23. He made little of the fact that Martins was laid off on Friday and those who were working under Normco were laid-off on Monday or Tuesday, saying in essence the men who were working for Normco should finish up their own work. Labourers Demers and Fequet were called back at the request of Normco around March 23, to do forming for curbs. Mr. Stolle said that after Mr. Martins was off the job, the representatives visited the site, but less frequently, and for shorter periods of time than when Mr. Martins was on site. Martel, a labourer who had been on WCB, was laid off at the same time as the others on March 10 and was not recalled.

25. On April 2 and September 4, 1992, Mr. Martins says that members of the executive drove by his house for the purpose of watching him and harassing him. They deny this, although Mr. Strizzi acknowledges he once went by Mr. Martins' house in September only because it happened to be on the way to where he was going.

26. On April 2, Mr. Martins was at the Eastern site with a video camera and tape recorder for the purpose of seeing if others had been recalled to the job. Two men had been recalled, and when Mr. Martins saw union representatives on the site, he raised this with them. Pat Strizzi testified that he then went on the site and asked Mr. Stolle why he had not recalled Mr. Martins. Mr. Strizzi says that Mr. Stolle said he could recall whomever he wanted and that he wanted nothing to do with Martins because he was a troublemaker. Mr. Stolle did not remember this conversation, and testified at the hearing that he did not recall Mr. Martins because he was sure there would be trouble with the union as long as Mr. Martins was on site, that he had never before had a grievance or this kind of attention from union representatives in the forty years he had been working in the construction industry. However, he said he would have taken Mr. Martins back if the union had sent him. The collective agreement provides no right to recall to a specific job; it is in the employer's discretion. The evidence about the reasons for failure to recall was heard over the objection of the union, as failure to recall was not pleaded. The evidence was admitted as arguably relevant to the complainant's theory of the case.

27. Mr. Martins was involved in an altercation in relation to a union meeting held on April 15, 1992 out of which there were assault charges laid. Although originally pleaded as part of the complaint, this aspect of the complaint was dropped by letter from complainant's counsel dated November 11, 1992.

28. This complaint was filed on June 15, 1992. Between July 2 and September 1, 1992, Mr. Martins was in Portugal. During this period, his brother Manuel Martins forwarded letters on Jose Martins' behalf to the union asking for copies of the out-of-work list which Martins remained on while he was out of the country. On July 7, September 4 and 10, the union forwarded partial out-of-work lists.

29. On July 23, 1992, Mr. Martins' appeal of his conviction by a Local Union Trial Board on the second set of charges under the union constitution was dismissed, and he was prohibited from attending union meetings for one year. This was a desired outcome, alleges Mr. Martins, because it meant he would not be able to stand for election in 1993.

30. On October 14, 1992, Mr. Martins commenced a second legal action against the executive. The Eastern project at Sheffield Road finished at about this time as well, and Mr. Martins

maintains that he would still have been at work at that job but for the intervention of the union in February and March, 1992.

31. When this matter first came on for hearing, the union asked that the complaint be dismissed for lack of a *prima facie* case, and in the alternative asked for further and better particulars. This resulted in the first interim decision, dated November 4, 1992, which allowed the complaint to proceed, but ordered particulars.

32. When the hearing ran the risk of becoming even more protracted because of the complainant's disclosure in mid cross-examination of tape recordings of various relevant events, the parties met in a mid-hearing consultation with another Vice-Chair of the Board. This process was followed by agreement on certain facts about the referrals which had been put in issue, and the confining of the complainant's case as set out above, and in the decision of June 21, 1993, to the fair representation aspect of the case.

33. At the close of the complainant's case, union counsel moved for a non-suit, which I allowed to be heard without an election as to calling evidence, because of the potential savings of time and money for the parties, if it were successful. However, I ruled against the non-suit motion by Board endorsement, dated August 19, 1993. To have given effect to the respondent's motion would have required weighing the evidence and assessing credibility. These are functions appropriately performed at the conclusion of the evidence.

34. Before dealing with the issues that are directly in dispute, it is important to state that many of the matters referred to above are not pleaded as breaches of the Act, but as background evidence going principally to the issue of motive. These include the charges brought against Mr. Martins under the union constitution, the drive-bys, and the anonymous telephone calls. These are matters that are before the courts, and it is not necessary or desirable to comment on the merits of those complaints. But the existence of these allegations and the charges is a telling indication of the sorry state of the relationship between the parties. The reciprocal accusation and mistrust which seems to typify the recent history between Mr. Martins and his local union provides a basis for questioning the motives of the union in dealing with Mr. Martins during the period in issue. The aggravated relationship between him and the local has lead me to scrutinize the union's actions very closely. This was contributed to by the sarcasm and unnecessary verbal swipes at Mr. Martins that all the union witnesses except Mr. Randazzo indulged in at times on the stand.

35. At the same time, it is important to acknowledge that it would appear that until 1989, Mr. Martins and the executive had a decent working relationship. The reasons for the deterioration are not for me to determine, as they appear to be largely internal to the trade union and before the courts in the civil actions, but it helps to understand what follows to know the content of the political agenda alleged to have been operative on the part of the local. It is related to Mr. Martins' belief that those in power in the local at the time of the events in issue wished to see him replaced by a person more to the liking of the people supportive of the group Mr. Martins saw as the insiders who include: Mr. Roy, the Local President, who laid the 1992 set of charges under the constitution and replaced Mr. Martins when he was removed from the executive, Mr. Carozzi, the Business Manager, Mr. Trunzo, the dispatcher, who recently became Mr. Carozzi's son-in-law, and Mr. Mullens, the secretary treasurer who laid the 1991 set of charges under the union constitution.

36. I have found it convenient to deal with the issues in this case under the following headings, which I will address in turn: a) the February 5, 1992 grievance; b) the visits to the Sheffield Road site by Local 527's business representatives; c) the settlement of the grievance; d) the lay-off on March 6, 1992. For each of those phases of the allegations, the Board deals with whether the

events in issue were driven by “anti-Martins” motivation on the part of the union or were otherwise in breach of section 69. Section 69 provides as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The Grievance

37. The allegation concerning the grievance is that it was the product of a conspiracy against Jose Martins. On the evidence before me, the individuals involved in the origination and processing of the grievance on behalf of Local 527 were two: Pat Strizzi, a Local 527 business representative, and Daniel Randazzo, their in-house counsel. Andre Roy, the Local President was involved in the settlement but not in the decision to grieve or its filing. Real Cote was involved in the site visits, and was with Pat Strizzi when he met with Daniel Randazzo, but there is no evidence to support a finding that he played any relevant role in the decision to file the grievance.

38. The argument on behalf of Jose Martins was that the local was being unduly, and discriminatorily, technical in grieving Martins’ hiring without reference to the hiring hall. The case was argued so as to fit into section 69 as a total failure to represent Jose Martins’ interests vis-a-vis his employer. Counsel argued that taking the work without a referral slip was well within accepted practice. Union witnesses agreed that the employment of Martins without a referral, in and of itself, would not have given rise to a grievance. Further, counsel underlines that the two labourers whom Eastern supplied to Normco after obtaining them from the hiring hall started work without a referral slip and no grievance was filed and the business representatives even delivered the slips to the site.

39. Pat Strizzi found out about the Eastern job at Sheffield Road on February 4, 1992, and he attended at the site. Although Mr. Martins believes that representatives were on site earlier, Mr. Strizzi’s evidence was supported by notes and not contradicted in any but a general way. The two labourers supplied to Normco, Demers and Martel, told him that they had been referred by the hall, whereas Jose Martins told him he had found his own job. Strizzi later discussed this with the dispatcher Trunzo, who verified that Eastern had made a proper job order for Demers and Martel, and asked Strizzi to deliver the slips to the site since the men had not had time to pick them up before reporting for work. There was considerable evidence about whether Demers and Martel might have been able to pick up the slips in any event, but I am satisfied that whether or not they could have, an arrangement had been made with them and the employer to start work without coming to the hall first, since they had been properly ordered by the employer, but contacted late in the day. I am also satisfied that nothing turns on the detail of whether they could have picked up the slips for the purposes of this complaint.

40. Complainant’s counsel stressed that the fact that Demers and Martel started work without the slips was a violation of the collective agreement, although a technical one, and that he considered it discriminatory that those violations were “fixed” by the business representative, by delivering the slips, whereas the one relating to Martins resulted in a grievance. The union argues that it is willful blindness to consider the two situations the same. In the one, the employer did what he was supposed to do; he called the hall. It was an administrative problem on the union’s part that it had not contacted the men early enough for them to obtain the slips prior to reporting for work. In Martins’ case, the employer and Mr. Martins ignored the hall and the collective agreement.

41. The other measure of the discriminatory nature of the grievance is, in the complainant's submission, the evidence, put in as stipulated fact, that indicated that on 24 occasions, in the period March to October, 1992 named labourers attended at work sites in the Ottawa area without having been requested from the union hall, and without referral slips. In each of these cases when the union discovered it, no grievance was filed against their employers. The union originally objected that this evidence could not form part of a *prima facie* breach of section 69 as it had nothing to do with the parties to this application, and that a grievance is against an employer, not an employee. I wrote as follows in my June 21, 1993 decision, which rejected that argument:

9. Having considered the submissions of the parties, the Board is not prepared to strike the allegations concerning the situation in which the union responded to discovery of other labourers' working without referral slips in a manner different than that of its discovery of Jose Martins' working without one. It is true that the other situations relate to other employers and work sites and that a grievance is not normally an action "against" an employee. However, in the context of a hiring hall and a multi-employer collective agreement, we are not convinced that the approach to different employers in arguably similar circumstances is necessarily irrelevant to an accusation of discrimination or bad faith. The union's role in representing and referring its members is not limited by one employment relationship in this context. Its pattern of approach to violations of the collective agreement or hiring hall rules thus is potentially relevant in a wider context as well. We agree with counsel for the union that filing a grievance can not per se, in isolation, be a violation of the Act. Nonetheless, when the potential outcome of a grievance clearly affects an individual directly, we are not prepared to dismiss out of hand the idea that, together with motive, grieving could be a discriminatory act. Thus, we do not think it appropriate to rule out the possibility that the complainant can establish through inference and argument that the difference in response to his situation was discriminatory or some evidence of the motive it alleges can be inferred from the other evidence in the case. Thus, the Board is not prepared to dismiss this portion of the complaint for failure to make out a *prima facie* case.

42. Although I am still of that view, the evidence before me does not support a finding that the grievance was a discriminatory act. Rather, it supports a finding that the decision to grieve was not motivated by a desire to punish Jose Martins, but by a desire to bring Eastern Construction quickly into line, as Mr. Randazzo, the Local's lawyer, was not familiar with them in the Ottawa area, and considered their practices in regards to Normco a serious breach of the collective agreement with Eastern. (The union also hoped to get a collective agreement signed with Normco in the process). It was because the union wanted to build a strong case against Eastern, and its dealings with a non-union subcontractor that the issue relating to the hiring of Mr. Martins without a referral from the hall was added. Although there was a considerable amount of innuendo about whether Mr. Randazzo had spoken with Carlo Trunzo, the dispatcher, or others, and perhaps received "anti-Martins" instructions, the evidence does not support such a finding. The information that Martins was on site without a referral had been provided to Mr. Randazzo by Mr. Strizzi. However, I do not find anything improper about this. The evidence indicates that it was provided in the context of giving Mr. Randazzo a run-down on the site, and was not the reason Mr. Strizzi consulted Mr. Randazzo. Rather, Mr. Strizzi consulted Mr. Randazzo because he thought a grievance should be filed about the non-union subcontractor, and Mr. Randazzo agreed.

43. Further, I accept Mr. Randazzo's evidence that the union exercises some deference to contractors continuously working within the Ottawa area and that underlies the fact that the union does not regularly grieve recalls without slips for contractors they are familiar with in the Ottawa area. Further, Mr. Randazzo did not see the Martins case as properly a recall under the Ottawa local appendix, section 15.01 set out above, as were the cases in which the union did not grieve. Mr. Randazzo's interpretation was that because the previous work done by Mr. Martins for Eastern Construction had not been covered by the Ottawa appendix, as it was done in another local's jurisdiction, that the recall clause, which is in the Ottawa appendix, accordingly did not apply. Although others, including the complainant, may disagree with the latter interpretation, I do not

find it beyond the range of reasonable interpretations. In any event, it was not the main reason for including the Martins' hiring in the grievance. It appears to be an argument Mr. Randazzo made during settlement discussions.

44. I have carefully considered the evidence that both Mr. Strizzi and Mr. Randazzo were aware of the conflict between Mr. Martins and the union at the time of the filing of the grievance. One route to the conclusions the complainant asks me to draw would be to say that since the "Martins problem" was in their minds at the time of the filing of the grievance, one could infer that it caused the action. I have come to the conclusion that this is not a fair conclusion on the evidence before me. To start with, I found Mr. Randazzo a convincing witness who straight-forwardly explained the dilemma he found himself in at the point at which he filed the grievance. It was his job to decide whether the information provided by the business representative warranted a grievance. He decided that it did, because what Eastern was doing with Normco involved two aspects which threatened the local's ability to maintain work for its members. The first was that it had contracted with a sub-contractor with no collective agreement with the Labourers, although it did have one with the Carpenters. This was, in Mr. Randazzo's view, a clear and serious breach of the union security provisions. Secondly, and in addition to the fact of the sub-contract, Normco was allowing Carpenters to do work that the Labourers claim as their own, a further serious threat to the work of the local's members. I find these two reasons to be legitimate as a basis for a grievance, and I do not find that the evidence gives me reason to conclude that Mr. Randazzo was positioning himself against the complainant because of the swirl of controversy surrounding Mr. Martins.

45. It is true that Mr. Randazzo was engaged almost exclusively by Local 527, and apparently represented the local on appeals from the findings of a trial Board against Mr. Martins. I have considered whether that in itself is enough to impugn Mr. Randazzo's involvement in the grievance; I do not find that it was. The surrounding evidence convinces me that what Mr. Randazzo did was not out of line with what he did in other cases, or what section 69 would demand of a person in his situation. There was uncontradicted evidence of a number of other specific situations in which Mr. Randazzo has included allegations of hiring without referral slips with sub-contracting grievances, to present the strongest case against an employer involved in a serious violation of the collective agreement such as contracting to a non-union sub-contractor. I found this to be important evidence which corroborated Mr. Randazzo's evidence of his motivation in including the Martins' situation in the Eastern grievance. The union acknowledged that if there had been nothing but the Martins referral found on the site visit, Mr. Randazzo would likely never have seen the information, and there would have been no grievance. Mr. Randazzo's best judgement was that he should not leave the Martins portion out when he would have put it in other cases, just because of the difficulties between the local and Mr. Martins. Instead, he sought to settle the Martins' portion at the earliest opportunity. I accept this evidence, and do not find it shows Mr. Randazzo to have been acting in a fashion which was arbitrary, discriminatory, or in bad faith. Although this dispute could have been avoided if Mr. Randazzo had decided that the Martins' portion was not strictly necessary to making the case against Eastern on subcontracting, it is not my view that section 69 required such a decision.

46. I do not wish to leave this subject without commenting on the evidence of when the local would grieve, and when it would not, in situations where the members found work without a referral from the hall. The practice of the local with regards to the enforcement of the collective agreement provisions about referral slips is selective, although not without its own logic. Such selectivity always leaves room for allegations like the ones before me, and the perception that the discretion involved in the selection is being wielded for political reasons. It would likely be, in my view, a breach of section 69 to use such discretion in a way harmful to the interests of a member for political motives. However, concerns of practicality and the cost of universal enforcement may

make such a policy of selective enforcement justifiable when political motives are not driving its implementation. I have concluded that Mr. Randazzo made the decision to include the Martins' referral in the Eastern grievance, and that his decision was not, on the evidence before me, politically motivated. I do not wish this decision to be taken as any general finding on the policy, as that was not the issue before me. This issue was whether grieving in this case, when the local has not in many other cases, was discriminatory in regards to Mr. Martins.

47. Union witnesses would not admit even a technical violation of Article 3.01(a) of the Master portion of the collective agreement or Article 15 of the Local Appendix, set out earlier in the case of Demers and Martel who started work without referral slips, as set out above. That section of the collective agreement provides as follows:

3.01(a) The Employer agrees to call the Local union by 1:00 p.m. for its needed supply of men for the following day. All employees hired through the Union *shall present to the Employer a referral slip from the Union prior to commencing employment.* It is understood that if the Local Union having jurisdiction over the work is unable to provide the required men within 24 hours the Employer is free to hire such labour as is available, but such labour shall acquire a referral slip, prior to commencing work on the second day after hiring and as a condition of employment, either be in good standing or apply for membership in the Union within seven (7) days.

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(emphasis added)

Complainant's counsel asked the Board to find that the clause is clear that employees are to provide a slip before starting work and that the union witnesses' position reflected negatively on their credibility in this area.

48. The failure to add the Demers and Martel "technical violations" is, as set out above, part of the theory of discrimination. It is quite clear that the approach of the employer in the Demers and Martel situation was, up to allowing them to start work without a slip, entirely appropriate. Since the union correctly felt it was its fault that the slips were not provided, I am not of the view that this aspect of the discrimination case is made out. There was no evidence that the union had ever grieved such a situation, and there is in substance, no serious threat to the union's authority where the job order has gone through the hiring hall. I accept that this is materially different from the situation where a company hires without any reference to the union at all. Thus I do not consider that Mr. Martins was in the same situation and treated differently. I find that he was in a different situation from Demers and Martel and thus not treated in a discriminatory way. Mr. Martins was treated similarly to other labourers found on sites without referral slips where there were also non-union sub-contractors.

49. Counsel noted that the sequence of events was curious in that the referral slips could have been sent over earlier, but were not sent until February 5, the day the local decided to grieve the Martins hiring. I found the evidence convincing that Mr. Strizzi, the business representative found out about the Eastern job on February 4, and proceeded to do a number of things more or less simultaneously to sort out the job situation. Given the union's view that it was its own fault that the two men had not had the slips, a not unreasonable view, I do not find it discriminatory for the referral slips to have been sent over. By contrast, the Martins situation was not one in which any job order or referral by the union had been made. Both the employer and Mr. Martins had operated without reference to the union hall.

50. Complainant's counsel also argued that it was an independent breach of section 69 to have failed to give notice to Mr. Martins at the time of the grievance when it affected his interests. Since this aspect was not pleaded, and it is not evident that it resulted in damage to Mr. Martins

since he had notice of the grievance shortly after, I find it unnecessary and inappropriate to determine this issue.

The site visits

51. As set out above, the complainant says that the union representatives visited the Eastern site abnormally often in order to get him fired and complained about bogus health and safety matters to make things difficult. Mr. Strizzi testified business representatives were on the Eastern site on February 4, 5, 13, 14, 18, March 5, 12, 13 and April 2. When averaged over the five working days, particularly in the period up until March 13, that is not so far off every two or three days, which was Mr. Martins estimate. There is no doubt from all the evidence that Eastern was getting a fair amount of attention from the union and that Mr. Stolle found a different atmosphere during the site visits than on any other job he had been on. The issue relevant to this case is whether it was because of or directed at Mr. Martins.

52. There is an issue between Mr. Strizzi and Mr. Stolle about how the union conducted itself during the site visits. This is only relevant to the issues before me to the extent that the complainant alleges that the union's uncharacteristically vigilant attention and/or belligerence was intended to make further employment of Mr. Martins undesirable for the employer. Counsel for Mr. Martins argued that it was very convenient for the union to say that all the visits were about Normco's sub-contract, and asserts that there is evidence to the contrary.

53. Mr. Stolle testified that business representatives were taking pictures of Mr. Martins at one point, as well as of the site, and that he would like to know why. The union argues that the representatives were not taking pictures of Martins, and that there is no evidence that anyone conducted themselves on the site in any way to object to or interfere with Mr. Martins' employment. Mr. Strizzi and Mr. Stolle both testified to an incident where they had words on site. As well, there was evidence from both that the representatives sometimes stayed after Mr. Stolle asked them to leave. Mr. Stolle testified that he thought the attitude of the representatives was that they wanted to tell him how to run the job. It is pleaded that it was because of the frequency of the visits and demeanour of the representatives towards Mr. Martins that Mr. Stolle came to recognize that the Local Union did not want Jose Martins to continue in the employ of Eastern.

54. I have carefully considered the pattern of visitation, and am not persuaded, even if I accept the complainant's evidence as to frequency, that the visits were aimed at Mr. Martins. Counsel asserted that returning every second day for more than 1/2 hour indicated that Mr. Martins had to be the reason they were going there. I am convinced by the evidence that this conclusion is not warranted. Rather, the evidence is persuasive that Mr. Randazzo had given instructions to the business representatives to collect evidence for the upcoming arbitration hearing, scheduled for March 9, which included the direction to go to the site as often as possible. The representatives were on site on four different dates after those instructions and before the lay-off of March 6. There did not seem to be any dispute over the facts in the Martins portion of the grievance; the evidence the representatives were collecting was needed to prove the sub-contracting portion. Photos in evidence, dated automatically by the camera, show pictures of Normco's operations taken on February 5 and 20, 1992. I found the evidence indicating that Mr. Stolle thought the representative also took a picture of Mr. Martins insufficient to support a finding that the union's conduct on site was unlawful, in light of my overall view of the evidence.

55. Nor am I convinced that the reference to occupational health and safety problems by the site representatives were bogus, or directed at making life difficult for Mr. Martins. Although it is certainly true that the power to refuse work, and to advise the members to do so is a powerful tool, as complainant's counsel argued, there is nothing improper in a representative reminding an

employer of the employees' rights in this regard. Mr. Martins thought the matters raised were insubstantial, and just for the purpose of disruption. However, the only concrete example given by Mr. Martins was a time when the representatives thought workers should be wearing fall protection or belts when working above 5 feet, rather than Mr. Martins' view that it was only over 10 feet. The parties did not choose to make argument about who was legally correct, nor was it necessary. For the purposes of this decision, it is enough that I find that this is not so indicative of disruption that I can conclude that bringing attention to safety matters such as the example given was an attempt to harass Mr. Martins. The examples of matters raised to which Mr. Strizzi testified, which included safety belts, ladders and debris, were not contradicted by either Mr. Martins or Mr. Stolle. The fact that Mr. Stolle was not happy with the visits, and did not like the representatives' attitude, is not, in my view, evidence of a violation of section 69.

56. There was some evidence which suggested that the union representatives expected Mr. Martins, as a union foreman, to take more interest in safety himself, and not to so quickly take the company's side, as he did with respect to the subcontracting violations. This aspect may well have provided some tension which was in reaction to Mr. Martins. However, I am unpersuaded that Mr. Martins was the cause of these visits, or that the reaction of the representatives to Mr. Martins' view of the situation with the subcontractors or any particular safety matter constitutes a breach of section 69. Section 69 does not require the union's representatives to agree with all its members, or to keep their disagreement to themselves.

57. However, Mr. Martins testimony was clear that he believed the site visits were aimed at him, and it is likely that this view was communicated to Mr. Stolle. Mr. Stolle and Mr. Martins had a working relationship which had for some time (going back at least to their sharing an apartment in Belleville in 1990 and 1991) included Mr. Martins sharing his side of the problems and conflicts with the union with Mr. Stolle. At the time of the preparation for the arbitration as well, Mr. Stolle testified he was concerned because Mr. Martins had told him he (Mr. Martins) was not invited to a union meeting. Evidence which indicates this type of communication to Mr. Stolle was continuing. This becomes relevant below to the discussion of whether the termination of Mr. Martins' employment was brought about by the union.

The settlement of the grievance

58. The complainant asserts that the settlement process was arbitrary in that Mr. Martins was used as a bargaining chip to wrest damages from the employer, and that it was a bad faith process in that there was an unwritten term of the settlement that he be terminated. I am asked to come to the latter conclusion by inference, given the timing of the settlement coincident with the termination. On this point, counsel for the union argues that the grievance did not ask for the termination of Mr. Martins because that was not part of the union's intention, as evidenced by the fact that his employment was secured and regularized on February 14. Union counsel further submits there is no evidence contradicting the evidence of the union's witnesses that Mr. Martins' employment was not in issue after February 14.

59. Counsel for Mr. Martins says that the memorandum of settlement has an unwritten term of it that Normco will be taken off the site. That is not set out in the settlement, but is such a strong term that the staff representatives attended the site several times after to police it. Counsel suggests that there was an equally strong unwritten term about Mr. Martins. The union says that the term of the settlement that provides that the employer will abide by the collective agreement in the future is the term which provides for Normco's being taken off the site and there was no term, written or unwritten covering the termination of Mr. Martins' employment.

60. As a separate allegation concerning the settlement process, the complainant objects to

the union's reservation of rights to claim damages after it had settled the referral part of the grievance by having Mr. Martins laid-off and rehired. This is said to have created a situation where the union kept the employer thinking that Mr. Martins was a problem, because right up to the end, they could have paid a lot of money just for having him there. The union had proposed \$20,000.00 as damages for both aspects of the grievance, a figure which the company rejected out of hand. Union counsel argues that the evidence shows that Mr. Randazzo balanced the various interests of the membership in handling the settlement process. It is not a breach of section 69 to keep damages on the table concerning Mr. Martins until the subcontracting portion was settled, says counsel, especially when Randazzo got the portion concerning Martins' job off the table at the earliest opportunity.

61. Having considered the evidence and arguments, I am unpersuaded that the union's reservation of its rights to negotiate damages for a period of approximately three weeks, and then compromising for a significantly smaller sum, ought to be construed in the manner suggested by the complainant. I accept that Mr. Randazzo's intention was to secure Mr. Martins' employment on February 14. Although Mr. Martins does not see it this way, it is in my view corroborative of Mr. Randazzo's evidence of his intention that he was willing to settle the part relating to Mr. Martins' employment before the whole matter was settled.

62. Mr. Roy was present for the settlement meetings, and signed the ultimate settlement. Mr. Randazzo's evidence was that Mr. Roy readily accepted his proposal to settle the Martins' part of the grievance at the outset of the negotiations. I have no evidence that Mr. Roy's participation in the settlement process was aimed at making, or in fact did make things worse for Mr. Martins, although it was clear that Mr. Roy has been willing to take action against Mr. Martins in other ways. Mr. Strizzi also attended a settlement meeting, although he was not part of the final settlement process. The evidence does not indicate he played any role in the settlement process which was in breach of section 69.

The Lay-off of March 6

63. The complainant's lay-off on March 6 is alleged to have been the direct, and intended, result of the union's actions as set out above. I have carefully reviewed the evidence of Mr. Martins and Mr. Stolle about their conversations of March 6, which were presented as key to understanding the complainant's theory of the case. There are certain areas in which they corroborate each other, and others which appear irreconcilable. I have concluded that Mr. Stolle's evidence is the more likely reliable, although there are certain areas of which he has no recollection. Crucial to the complainant's theory of the case, was Mr. Martins' testimony that on the morning of March 6 at 7 a.m., Mr. Stolle sent him home saying that he had better go home, so there could be no complaint about discrimination, and then called him back to the site to have a second conversation with him. In the second conversation, at about 10 a.m., Mr. Stolle is said to have been very upset and to have said, "They want me to lay you off"; and "Do me a favour; go by the hall and register so they know I laid you off."

64. Mr. Stolle testified about one conversation on March 6, which he placed at coffee break around 9 or 10 a.m. He said they had run out of work, and the budget could not afford to keep the men on. Mr. Stolle does recall talking about the grievance with Mr. Martins, and telling him that the union was looking for \$3,000, a sum Mr. Martins then offered to pay himself. Mr. Stolle had been at a meeting with the labour relations officer on March 5, and recalled \$3,000 as the figure the union was looking for to settle the Martins portion of the grievance. However, there is no evidence that Mr. Stolle had any communication with any of the people who were working on settling the grievance on March 6, and he said the final settlement was not discussed with him. His respon-

sibility clearly did not extend to the labour relations end of Eastern's operations. Mr. Stolle testified that he alone made the decision to lay-off on March 6, and that he made it probably on March 5, and that his superiors were never involved in lay-offs for shortage of work. And that is what Mr. Stolle clearly said the March 6 lay-off was. He specifically said that the lay-off had nothing to do with the union and that he did not discuss going on the out-of-work list with Mr. Martins. This evidence, which I accept, renders inexplicable the evidence given by Mr. Martins about Mr. Stolle's upset, his reference to someone wanting Mr. Martins laid-off and his plea that Martins go register on the out-of-work list, all on March 6.

65. Union witnesses specifically denied discussing Mr. Martins on the morning of March 6. Counsel for Mr. Martins argued that I should accept Mr. Martins' evidence that Mr. Stolle told Mr. Martins to register at the hall at 10:00 a.m. and find this remark was due to the fact that the tentative deal reached elsewhere by Mr. Randazzo, Mr. Roy and representatives of the company, was conditional on Mr. Martins' being out of work. In my view, the evidence does not warrant that conclusion. First of all, Mr. Stolle says he never discussed registering at the hall or going on the out-of-work list with Mr. Martins on March 6. The fact that the settlement documents were not signed until the afternoon is not enough to persuade me to draw the conclusion that the two important events of March 6, the settlement of the grievance and the layoff, were synchronized and interdependent. The time lapse is equally well explained by the fact that the documents had to be drafted and signed by the parties. Although the complainant's case included a suggestion that I should draw an adverse inference from the failure of the union to call the company representatives to rebut the suggestion of the unwritten term, in light of the fact that the onus of proof is squarely on the complainant, I am not of the view that inference should be drawn.

66. When I view all the evidence, and the considerable difficulty Mr. Martins had in various portions of his evidence in keeping matters in sequence, I have concluded that the remarks about someone wanting Mr. Stolle to lay Mr. Martins off, which Mr. Martins attributes to Mr. Stolle, which Mr. Stolle does not recall, make much more sense if they were said on the morning of February 14. February 14 was also a Friday and was the day Mr. Stolle received a copy of the partial settlement, which he termed "instructions" to lay Mr. Martins off. As well, Mr. Martins testified that it was during the same conversation that Mr. Stolle told him that "they" wanted him laid off that he first heard about the grievance, which makes sense on February 14, but is clearly incorrect of March 6. Mr. Martins clearly knew about the grievance when he was laid off on February 14, as evidenced by his vociferous complaints about it at the union meeting of February 19.

67. The only evidence from which I could draw an inference that Mr. Stolle was somehow acting on the union's instructions, or a deal between the union and the company, in laying off Mr. Martins on March 6 is Mr. Martins' evidence. When it is not corroborated by the company decision maker himself, I am unwilling to draw that inference, given the problems with sequence I have set out above.

68. It is further alleged that Mr. Trunzo the dispatcher, and Mr. Rossi a field representative, laughed at Mr. Martins when he went into the union hall to put his name on the out-of-work list on March 6. I am asked to find that this would not have happened unless they knew it was coming. Given the overall state of the relationship between Mr. Martins and the executive and staff of Local 527 at the union, and the sarcasm of Mr. Trunzo on the stand, it may well be that some unfortunate exchange took place, although Mr. Trunzo has no recollection of this. However, there is no evidence Mr. Trunzo was included in the settlement discussions at all, or that he knew that Mr. Martins had been laid-off before he came into the hall. Even if there were snide remarks at the union hall, it is not enough to fix the union with having organized Mr. Martins' dismissal.

69. The alternative argument made is that it is enough to find a violation of section 69 that by processing the grievance and involving Mr. Martins in it, the union knowingly created an environment that was calculated to cause the company to terminate him. This is supported by Mr. Stolle's evidence that the reason he did not recall Mr. Martins by name is that the union would cause problems everyday as long as Mr. Martins was on the site. Given all the evidence I have heard, this remark makes sense only if Mr. Martins had communicated his view of the reason for the site visits and grievance to Mr. Stolle. It does not in my view accord with the evidence about the site visits themselves. Mr. Stolle was irritated by the grievance and the site visits, but in my view, the evidence does not provide a basis for finding that the union's intention was to irritate Mr. Stolle, or that anything was done to link their presence on site with Mr. Martins. Even if Mr. Stolle blamed Jose Martins' presence for the attention Eastern was getting, the evidence does not warrant a finding that this was the union's doing. I am thus unpersuaded that the alternative view of the facts should lead to a finding of a breach of section 69.

70. The complainant also alleged that the March 6 lay-off was a phoney shut-down to cover the deal to get rid of him. I have no evidence to support such a finding. Mr. Stolle, the complainant's witness, described a situation where changes in the owners' requirements meant there was no more work for them to do at the time. I have no reason to discount his evidence and I find therefore that the March 6 lay-off was not engineered to cover-up a conspiracy to get rid of Mr. Martins.

71. The case for Mr. Martins also includes the assertion that other people did work between March 6 and 10, 1992, which could have been done by Mr. Martins. Mr. Stolle testified that the other men were working under Normco at the time, and it would not have been fair to have pulled them off the job for such a short time and put Jose Martins on the Normco work, although he acknowledged it was work Martins was capable of doing. He did not think the time delay was significant in any event, since he considered the job shut down to be general. There is nothing in the evidence to link the difference in the lay-off dates to the union.

72. The uncontradicted evidence is that Frank Stolle had on other sites kept Mr. Martins working through short lay-offs. The fact that he did not on this occasion, and that he did not recall him at the first available opportunity, makes clear that the special positive work relationship between Mr. Stolle and Mr. Martins was effectively at an end. Mr. Stolle's evidence did not completely explain this. However, there is insufficient basis for me to fix the union with responsibility for the complainant's loss of privilege from Mr. Stolle. I simply have no evidence to find, or from which I can infer, that Mr. Stolle was being influenced in some improper way by the union when he made the decisions he did about Mr. Martins' continued employment. There are many reasons an employer might have decided to discontinue what was special treatment of Mr. Martins. In this respect, I have tried to make sense of the remark Mr. Martins said Mr. Stolle made on the morning of March 6, which Mr. Stolle did not contradict, that he should go home so there was no charge of discrimination. It may be that it had come to the attention of Mr. Stolle's superiors that he had a labour foreman with no crew being paid the foreman's premium, and that Mr. Stolle came under scrutiny for this. There was some evidence, for instance, that on February 14, Mr. Elwood, Eastern's District Manager, was at the site talking to Mr. Stolle about the agreement about Mr. Martins, although I have no evidence of the content of that conversation. And no labour foreman was hired again on the Sheffield Road site; Mr. Stolle gave the orders directly to his labourers for the rest of the project. Mr. Stolle's evidence, set out above, about why he did not recall Mr. Martins by name was to the effect that he expected problems with the union. He specifically said this was not the case for the March 6 lay-off, that it had nothing to do with the union. Thus, Mr. Stolle's evidence does not support the view that he was trying to tell Mr. Martins that he was being laid off because of the union when he said he should go home so there would be no claim of discrimination. And there is no evidence before me that the union had raised any issue about discrimination.

because of Eastern's favourable treatment of Mr. Martins. Thus, I have no evidentiary basis to conclude that this remark was the result of the union's activity.

73. What makes this case difficult is the evidence that the members of the local union leadership who preferred charges against Mr. Martins were quite prepared to see him lose his membership in the local and thus his right to work through the hiring hall, the only job security a labourer such as Mr. Martins has. Where a result similar to that objective occurs after an action by the union which directly affects the complainant, it is not hard to see how the complainant makes a causal connection. However, causation is not proved only by showing that one event came after the other, and when the chain is said to go via a third party whose interest is not, in any relevant way, aligned with the union's, it becomes more problematic.

74. I have considered carefully the facts that Mr. Martins had had difficulties with Local 527 throughout his time in Belleville, and that on his return to Ottawa, members of the executive were clearly positioned against him as evidenced by the charges laid against him. There was clearly no love lost between the individuals involved in the history of Mr. Martins' dispute with the union. As I said above, there is room for improper motive against Mr. Martins on the facts before me, and I have therefore scrutinized the evidence very clearly. In the final analysis, I am not persuaded that everything the union did at Eastern was poisoned because of these conflicts, or that there was a successful conspiracy here.

75. In this respect there are certain matters that need to be addressed, and they include Mr. Roy's remark about removal from the job, which he corrected to say removal from the meeting. The February 19 meeting at which this occurred was only 2 days after Mr. Martins had been sent to the union hall to get a slip and go back to the work site, a part of the settlement for which Mr. Roy had been in attendance. More importantly, to the complainant, it is two weeks before March 6 when he says the threat was brought home. To me this incident is evidence of the aggravated relationship between the parties, but does not go so far as to prove that the union arranged the March 6 lay-off. Although I accept that Mr. Roy corrected himself immediately, removal from the job was probably not far from Mr. Roy's mind, both because of the events of the week before, when Mr. Martins was removed from the job, and also because the charges he preferred less than two weeks later asked for removal of membership, which would have had the result of the local's not being able to refer Mr. Martins for a job. If there was a threat made at the meeting which was carried out, it is my view that it was the preferring of the charges. Mr. Roy said clearly at the meeting that if Mr. Martins did not leave with the Sergeant-at-Arms, he would charge him. Mr. Martins did not leave and said, "Charge me, charge me". In light of the evidence I have dealt with above about the settling of the grievance, and the lay-off, I do not find Mr. Roy's comments sufficient to establish the theory that the union planned to secure the March 6 lay-off/termination.

76. I have also considered the allegations concerning drive-bys and anonymous phone calls. The drive-bys complained of did not occur until after the March 6 lay-off. Furthermore, the evidence surrounding them is inconclusive, and not persuasive on the issues before me. As well the phone calls were not shown to be the doing of the union, and could equally well have been produced by random computer dialing. These matters would go to motive, in any event, and as I have said above, there is enough evidence of the aggravated relationship between the parties that I do not have to be convinced that motive against Mr. Martins was a possibility.

77. In argument, counsel for the complainant referred the Board to *Great Lake Forest Products Limited*, (complaint of Patrick Gain and David Smith), [1979] 3 Can LRBR 205, for the proposition that if the union is in significant part responsible for the alteration of the employment relationship, it will be enough to find a breach of the Act. In that case, the union had sought to

keep two apprentices from working because of a belief that they represented a threat to the union's work, and/or because they had crossed a picket line. The Board found that the union was not operating with a permissible collective bargaining objective, and thus was operating out of irrelevant and therefore arbitrary considerations. Thus, the union breached what is now section 69 by not properly integrating the complainants' employment interest with the interests of those of the collective whole. Union counsel referred to the same case for the proposition, set out at p. 214, that the complainants had a right to expect that their employment interest would be protected by the union and would only be modified to the extent necessary to achieve a legitimate collective goal, and then only in a manner which was not arbitrary, discriminatory or in bad faith. The union takes the position that if the goal and the means are lawful, a breach of section 69 cannot be found.

78. Complainant's counsel also referred to *Toronto East General and Orthopaedic Hospital Inc.* (Zoltan Zahoransky complaint), [1980] OLRB Rep. Apr. 555, where a petition organized by a union steward and local president, which contained the threat of a work stoppage if the complainant were not discharged, lead the employer to consider discharge when it had not earlier done so. Complainant's counsel said that the union here did what was found to be illegal in that case; the union put the man's employment on the employer's agenda, and in doing so, breached what is now section 69. By contrast, in referring to the same case, union counsel argued that where no malice or ill will is shown, the balancing of interests by a union will not be found to have breached section 69. In that case, the Board found that the union officials demanded the complainant's discharge solely on the basis of false rumours and unfounded suspicions which they never bothered to investigate or seek to verify. The Board easily came to the conclusion that this was arbitrary conduct.

79. Several other cases were referred to by the union for the standard of care required of a union under section 69 and the importance of subcontracting clauses in the construction industry. These were: *Walter Prinesdomu and Canadian Union of public Employees Local 1000 and Ontario Hydro Employees Union*, [1975] Can LRBR 310; *Graphic Arts International Union, Local 517 and Lawson and Jones Limited*, [1977] OLRB Rep. Mar. 143; *Charles Morgan, and Registered Psychiatric Nurses' Association of British Columbia*, [1980] 1 Can LRBR 441; *Chrysler Canada Limited*, [1982] OLRB Rep. Oct. 1417; *Savage Shoes Ltd.*, [1983] OLRB Rep. Dec. 2067; *Brant County Board of Education*, [1986] OLRB Rep. Sept. 1187; *Rocca and Ontario Catholic Occasional Teachers Association and Metropolitan Separate School Board*, [1989] 2 CLRBR (2d) 111; *Maria Mlakar*, [1989] OLRB Rep. Nov. 1246; *Corporation of the City of Sault Ste. Marie and Labourers' International Union of North America, Local 1936*, unreported interest arbitration decision, dated March 13, 1992.

80. The two cases cited by complainant's counsel are the most analogous to the facts before me, although both cases are clearly distinguishable on the facts. Both stand for the proposition that where a union secures the termination of an employee in its bargaining unit without justification rooted in the rights of the collective whole, a violation of section 69 will be likely found. If the union sets up an employee for termination by the employer, as in *Toronto East General*, it will not be able to shelter its actions by saying that the employer had just cause in any event or that the termination did not breach the collective agreement.

81. The complainant's case is firmly based on the idea that the union intended to and did "get" Eastern Construction to terminate Mr. Martins on March 6, 1992, with the foreseeable consequence that he was never recalled. However lively the mutual antipathy of members of the local union leadership and Mr. Martins may have been, the facts before me do not convince me that is the case before me. I have set out above that I found the filing of the grievance and its settlement, which included the regularizing of Mr. Martins' employment with no loss of pay, legitimate on the evidence before me. And I have set out that I accept Mr. Stolle's evidence that the union had noth-

ing to do with the March 6 lay-off. I have also made it clear that Mr. Martins' privileged work relationship with Mr. Stolle ended with the March 6 lay-off. This is a significant loss to Mr. Martins. And there is nothing in the evidence to assure me that the attention focused on Mr. Martins by the company in dealing with the grievance was not partly the cause of a re-evaluation of his special status. However, equally, and crucially to the determination of this case, the evidence does not persuade me that the loss of status or employment was the goal of the grievance, its settlement, or the site visits. The company was free to commence dealing with Mr. Martins in a non-special way, and it did so. I would have to be convinced that the union set out to effect this end, and that it did so for reasons irrelevant to the collective bargaining objectives it is supposed to be pursuing to find this constituted a breach by the union. On the evidence before me, I am not convinced that either is the case concerning any of the events pleaded as leading up to the March 6 lay-off. And I have found that the evidence before me of events after March 6 does not alter that view.

83. The above findings are not intended to indicate a view on the equities involved in the ongoing internal conflicts concerning the same people or the protracted unemployment of the complainant. The relationship is a seriously troubled one, and the merits of issues other than the ones dealt with above, and the responsibility of the various players, remain to be determined or resolved elsewhere.

84. For all the above reasons, this complaint is dismissed.

0412-91-R United Food and Commercial Workers International Union, Local 175, Applicant v. McCarthy Milling Limited, Responding Party v. ADM-Agri Industries Limited, Intervenor

Certification - Constitutional Law - Reconsideration - Employer operating flour mill and seeking reconsideration of 1991 decision certifying trade union - Employer asserting that its operations involve federal work and that Board without constitutional jurisdiction to deal with 1991 certification decision - Board noting that bargaining rights granted by certificate since subsumed by collective agreement entered into by union and employer - Decision on constitutional propriety of certificate issued in 1991 would not resolve constitutional issue which would continue to exist between the parties - Board declining to entertain reconsideration request

BEFORE: *Louisa M. Davie*, Vice-Chair, and Board Members *G. O. Shamanski* and *J. Redshaw*.

APPEARANCES: *Michael Klug, John Carreiro* and *Bill Richardson* on behalf of the applicant; *Mark Contini, John Barrack* and *Michael Jarrett* on behalf of the intervenor.

DECISION OF THE BOARD; May 25, 1994

1. The style of cause is amended to reflect that ADM-Agri Industries Limited has been added as an intervening party to these proceedings.

2. This is a request for reconsideration in which the Board is asked to reconsider and revoke its decision dated May 29, 1991.

3. This matter was heard by this panel on March 29, 1994. At the conclusion of the hearing on that day the panel rendered the following unanimous oral ruling:

We have considered the submissions of the parties with respect to the trade union's preliminary motion that the Board ought not to entertain this application for reconsideration and have determined to grant that motion with our reasons to follow.

In granting the motion we recognize that given the nature of this issue and the dispute between the parties this matter may surface again at some point in the future. In our view however there are sound competing reasons which balance, (and in this case outweigh) the reasons advanced by the applicant for reconsideration in support of its request that this matter ought to be determined at this time and in this context.

We now provide our reasons.

4. The relevant provisions of the *Labour Relations Act* ("the Act") and the Board's Rules of Procedure ("Rules") which govern applications of this sort are section 108 of the Act and section 85 of the Rules. These state:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

(2) If, in the course of bargaining for a collective agreement or during the period of operation of a collective agreement, a question arises as to whether a person is an employee or as to whether a person is a guard, the question may be referred to the Board and the decision of the Board thereon is final and conclusive for all purposes.

(3) Where the Board has authorized the chair or a vice-chair to make an inquiry under clause 105 (2) (h), his or her findings and conclusions on facts are final and conclusive for all purposes, but nevertheless he or she may if he or she considers it advisable to do so, reconsider his or her findings and conclusions on facts and vary or revoke any such finding or conclusion.

Section 85 of the Rules state:

85. No request for reconsideration will be considered where it is filed thirty (30) or more days after the date of the Board's decision, except with the permission of the Board.

5. On May 29, 1991 the Board (differently constituted) certified the United Food and Commercial Workers' Union, Local 175 ("the Union") as the bargaining agent of:

all employees of McCarthy Milling Limited in the City of Mississauga save and except foremen, persons above the rank of foremen, lab technicians, office and clerical staff.

That decision was rendered without a hearing as the union and McCarthy Milling Limited had reached agreement on all matters in dispute between them, and had each agreed to waive their right to a formal hearing in the certification application. It is this decision which the Board has been asked to reconsider by ADM-Agri Industries Limited ("ADM").

6. The primary submission in support of this request for reconsideration is that the Board did not have the constitutional jurisdiction to deal with the application for certification and issue the decision dated May 29, 1991 because the operations of the responding party involved a federal work and employees employed in connection with that federal work.

7. At the hearing on March 29, 1994 counsel for the trade union made a preliminary motion that the Board should not entertain this request for reconsideration. He requested that the reconsideration application be dismissed without a further hearing.

8. Counsel for the union made a number of submissions in support of his motion. First, he noted that the party requesting reconsideration did not have the requisite status to make the request as it was not an original party to the proceedings in which the decision sought to be reconsidered was rendered. Secondly, he referred to the time which has elapsed since the Board's decision of May 29, 1991. He argued that a delay of nearly three years should cause the Board to refuse to reconsider its decision. Of more significance however was counsel's assertion that the Board's decision dated May 29, 1991 and its certification of the trade union has become largely superfluous because after it was certified the union negotiated a collective agreement covering the bargaining unit for which it had been certified. It was the union's position that its bargaining rights therefore stem from that collective agreement and do not stem from the Board's decision dated May 29, 1991 or the certificate granted to the trade union. Reconsideration of the Board's original decision certifying the union would therefore be an academic exercise which would have no practical effect or result. The subsequent negotiation of a collective agreement by the parties has rendered moot both the Board's May 29, 1991 decision and certification of the union, and any jurisdictional issues arising from that decision and certification.

The Status Issue

9. This request for reconsideration has been made by ADM. ADM was not an original party to the certification proceedings at the time the Board rendered its decision dated May 29, 1991 and certified the trade union. In its application ADM asserts that it is the successor employer to McCarthy Milling Limited. It asserts that it purchased McCarthy Milling in July 1991 and thereby became the successor employer pursuant to section 64 of the Act. Counsel for ADM also asserts that by virtue of section 64 (2.1) it became a party to the certification proceeding before the Board and therefore now has status to bring this reconsideration request.

10. The trade union pleads that any sale of McCarthy Milling took place prior to the decision of the Board dated May 29, 1991 with the result that any issues which ADM now seeks to raise could have been raised at the time of the certification proceedings. As such the "due diligence" test enunciated in the Board's jurisprudence dealing with reconsideration requests has not been met by ADM with the result that this reconsideration request ought not to be entertained by the Board. Counsel for the trade union also notes that there has not been any application made to the Board, or any declaration made by the Board, pursuant to section 64 of the Act. As a result counsel for the union questions the applicability of that section to these proceedings.

11. In the circumstances of this case we have not found it necessary to determine whether the sale of McCarthy Milling Limited to ADM took place shortly before or shortly after the decision of the Board dated May 29, 1991. With respect to counsel for the union's submissions that there has not been an application to the Board, or a declaration made by the Board under section 64 of the Act, we note merely that section 64 specifies that if the predecessor employer is a party to a proceeding before the Board (as McCarthy Milling Limited was), then a successor employer is a party to the proceedings as if it were the predecessor employer *until the Board declares otherwise*.

12. We have dealt with this matter and the trade union's preliminary motion by assuming, without finding, that a sale within the meaning of the Act did take place from McCarthy Milling Limited to ADM and that by reason of that fact ADM has status as a party to the certification proceeding before the Board in which this reconsideration request is made.

The Delay Issue

13. As noted, the basis for the request for reconsideration is that the Board did not have the constitutional jurisdiction to certify the union. In our view delay is not a relevant consideration where the matter deals with the constitutional jurisdiction of the Board as the doctrine of delay and laches cannot apply to give to the Board constitutional jurisdiction where it would not otherwise exist.

The Constitutional Jurisdiction Issue

14. Counsel for ADM submits that pursuant to section 92(10)(c) of the *Constitution Act 1867*, legislation governing labour relations on works declared to be for the general advantage of Canada falls within federal legislative competence and is outside provincial legislative competence and therefore outside the jurisdiction of the Act and this Board. Counsel referred to section 76 of the *Canadian Wheat Board Act* RSC 1985 as amended and submitted that all flour mills have been declared by the Parliament of Canada to be for the general advantage of Canada. McCarthy Milling Limited did, and its successor ADM does, operate a flour mill in the city of Mississauga. The application for certification and the Board's decision certifying the union relates to employees employed at that flour mill. As the operation of the flour mill has been declared to be for the greater advantage of Canada it is exempted from provincial jurisdiction. The Board had no jurisdiction to certify the union in its decision dated May 29, 1991 and the certificate granted is void *ab initio* because the labour relations of this operation are federally regulated and subject to the Canada Labour Code.

15. In addition, in its pleading, ADM also submitted that as the Board did not have the constitutional jurisdiction to certify the union, the certificate granted did not bind ADM when it acquired ownership of McCarthy Milling Limited. Consequently, the collective agreement affecting ADM's employees is not valid or applicable because negotiations between the parties took place on the mistaken premise that the certificate was valid and the parties were bound to follow provincial legislation. In its pleadings ADM also submits that it did not voluntarily recognize the union nor did it voluntarily agree to negotiate a collective agreement. These actions flowed directly from the granting of the certificate by the Board.

16. Before this panel counsel reiterated that this was ADM's *primary* position but acknowledged that ADM's negotiation of a collective agreement could be construed as voluntary recognition of the union. It was submitted however that any determination whether there has been voluntary recognition is beyond the jurisdiction of this Board and is properly determined pursuant to the applicable provisions of the federal legislation governing labour relations upon federal works.

17. Counsel referred to *Ward Shellington*, [1974] OLRB Rep. Sept. 609, *Bill Thompson Transport Limited*, [1986] OLRB Rep. Jan. 2 (for the proposition that reconsideration of the original certificate is the appropriate mechanism for the constitutionality of the certification to be raised), and *Arnprior and District Memorial Hospital*, [1981] OLRB Rep. Aug. 1089. With respect to the jurisdiction of the Board and the constitutional issues raised in connection therewith counsel referred primarily to *Ontario Hydro*, [1993] 107 D.L.R. (4th) 457 (SCC) and distinguished *Cargill Grain Company*, [1989] 63 D.L.R. (4th) 174 (FCA). The pleadings refer also to *Maple Leaf Mills Limited (Komoka Branch)*, [1969] OLRB Rep. Feb. 1177, *Super Sweet Formula Feeds*, [1965] OLRB Rep. June 212, *Shure-Gain Division, Canada Packers Inc.* 80 di 71 and *Central Western Railway Corporation v. United Transportation Union et. al.*, [1989] 2 F.C. 186.

18. Counsel for the trade union disputed that the Board's decision of May 29, 1991 related to a federal work or undertaking or employees employed in connection with a federally regulated

operation. Counsel asserted that in order to determine the issue with respect to the constitutional jurisdiction of the Board it was necessary to examine the entire operations or undertaking of an employer to determine whether the particular part of the operations or the employees for whom the trade union was certified worked upon an “integral”, or merely an “incidental”, part of an operation that is under federal jurisdiction. Thus, even if McCarthy Milling Limited and/or ADM did operate a flour mill, and even if flour mills were “works” declared to be for the general advantage of Canada, that would not answer the question of constitutional jurisdiction because it does not follow that the “undertaking” of the employer is within the federal sphere merely because a part or one of its “works” (which is not an integral part of its undertaking) is federally regulated. Similarly, even if a particular work falls within the federal sphere, it does not follow that the labour relations of all of its employees are governed by federal legislation. Counsel for the union relied principally upon *Cargill Grain Company, supra*.

19. The constitutional issues of jurisdiction raised by the parties during the course of their submissions are complex and by no means clear cut. Under the circumstances however we have determined it is neither necessary nor appropriate for the Board to resolve those issues within the context of this reconsideration request.

The Collective Agreement Issue

20. It is not disputed that after the trade union was certified in May 1991 it entered into negotiations for a collective agreement covering the employees in the bargaining unit. The collective agreement which resulted from those negotiations was between the union and ADM. (We note parenthetically that during the course of those negotiations, and pursuant to the provisions of provincial legislation, the union applied for conciliation and a “no board” report was issued by the conciliator appointed). The first collective agreement ultimately achieved between the parties expired on July 31, 1993. Although negotiations for its renewal have taken place, a renewal agreement has not been achieved.

21. It is the existence of these circumstances which caused the Board to grant the trade union’s motion and to refuse to entertain this request for reconsideration.

22. It is well established that when an agreement has been entered into following the certification of a trade union the certificate granting the trade union bargaining rights is “spent”. That is to say that from that point forward, the bargaining rights of the trade union which exist between the parties flow from the collective agreement rather than from the original certification. The bargaining rights granted by the certificate are merged into and subsumed by the collective agreement subsequently entered into.

23. In the circumstances before us this concept of the merger of the bargaining rights is particularly important. In this case the bargaining rights granted to the trade union by the certificate of the Board was with respect to the employees of *McCarthy Milling Limited*. The bargaining rights of the union found in the collective agreement however are with respect to the employees of *ADM*. Thus, in the context of this application for reconsideration, if the Board did reconsider its decision dated May 29, 1991 and revoke the certificate of the trade union with respect to the employees of McCarthy Milling Limited, it would not affect the bargaining rights of the union flowing from the expired collective agreement between the union and ADM covering the employees of ADM.

24. A determination by the Board of the constitutional propriety of the issuance of the certificate to the trade union in the earlier proceedings between the trade union and McCarthy Milling

Limited does not and can not resolve the issues relating to constitutional jurisdiction which continue to exist between the union and ADM.

25. In this reconsideration request the only issue which can be resolved is whether the Board had the constitutional jurisdiction to certify the trade union at the time it issued its decision on May 29, 1991. That issue is not necessarily the same as whether the Board *continues* to have the constitutional jurisdiction, or whether provincial legislation *continues* to govern the labour relations of ADM and the union. (It is not difficult to imagine circumstances in which, at the time a certificate is granted a predecessor employer is governed by provincial legislation but subsequent events, or the purchase by a successor employer, renders that formerly provincially regulated operation subject to federal regulation and laws. The reverse circumstances whereby a predecessor employer formerly governed by federal legislation becomes subject to provincial legislation as a result of changed circumstances, or a successor employer's purchase of the operation, is equally plausible). Thus, in the context of this reconsideration request, a determination that in May 1991 McCarthy Milling was or was not a federal undertaking subject to federal laws governing labour relations, does not in 1994 necessarily answer or assist ADM in its position that *its* operations are federal and *its* employees are employed upon or in connection with that federal undertaking.

26. It may be that the manner in which we have determined to exercise our discretion whether or not to entertain this reconsideration request is unduly technical focusing as it does upon the identity of the responding party in the original certification proceedings. Certainly, and as indicated during the course of the hearing, the underlying issue as to whether the labour relations between ADM and the trade union are subject to federal or provincial legislation is not moot and may be raised in the future under a myriad of different circumstances --- counsel for the employer cited as examples the employer's contestation of the future appointment of any provincial conciliator because of its position that its labour relations are not governed by provincial legislation, or its assertion during any strike that the newly enacted replacement worker provisions of Bill 40 (see section 73.1 of the Act) are not applicable to flour mills which have been declared to be for the greater advantage of Canada and which are therefore exempted from provincial labour relations legislation.

27. The constitutional issues raised by the parties however are complex. Those issues only become *more* complicated and intricate in the circumstances of this reconsideration request because of the "sale" from McCarthy Milling to ADM, and given the doctrine of the merger of bargaining rights granted by a certificate into a collective agreement negotiated thereafter. In our view the constitutional issues are more properly dealt with separate and distinct from these complicating factors.

28. For policy reasons the Board is also reluctant to embark upon a reconsideration request more than two and a half years after the issuance of its decision when the parties are, at least in chronological terms, well into their collective bargaining relationship.

29. Over the years the Board has established certain parameters around the exercise of its discretion to reconsider its decisions. (See for example *K-Mart Canada Limited (Peterborough)*, [1981] OLRB Rep. Feb. 185, *John Entwistle Construction Limited*, [1979] OLRB Rep. Nov. 1096). These parameters include a general reluctance to entertain reconsideration requests which do not disclose an intention to adduce new evidence or make new representations *which a party did not have a previous opportunity to raise*. If the Board were to entertain this reconsideration request in the circumstances of this case those parameters would be compromised. In this regard, in our view it is irrelevant that ADM has recently retained new counsel who made the reconsideration request as soon as he became aware that the union had been certified under provincial legislation.

30. Moreover, the parameters would be compromised in circumstances where the issue of whether the Board *had* the constitutional jurisdiction has become somewhat theoretical and abstract. In this case, where the issue can *also* be raised in more concrete terms and adjudicated upon in the context of present day, existing, specific or particular facts, that mechanism is to be preferred over the reconsideration of a 1991 decision.

31. For all of these reasons we granted the trade union's motion not to entertain this reconsideration request. We have made no decision with respect to the constitutional jurisdiction of this Board to deal with labour relations matters between ADM and the union. Our decision therefore is without prejudice to the positions of either of the parties in the event this matter is properly raised before the Board, or any other tribunal in any future proceedings.

3249-92-R; 3250-92-R Independent Canadian Transit Union and its Local 6, Applicant v. **Olympia & York Developments Limited**, Responding Party; Independent Canadian Transit Union and its Local 6, Applicant v. Olympia & York Developments Limited, Responding Party v. United Brotherhood of Carpenters & Joiners of America, Local 93, Intervenor

Bargaining Unit - Combination of Bargaining Units - Remedies - Board earlier combining newly-certified unit with already-existing bargaining unit, and remaining seized - Board declining to make direction under section 7(5) where parties had not engaged in real negotiations concerning terms and conditions of employment of newly certified employees - Board remaining seized

BEFORE: R. O. MacDowell, Alternate Chair, and Board Members R. M. Sloan and H. Peacock.

APPEARANCES: Nelson Roland, Cindy Read and Michel Vendette for the applicant; W. G. Phelps, M. E. Keenan, B. Goodman and K. Brouillard for the responding party; no one appearing for the intervenor.

DECISION OF THE BOARD; May 2, 1994

I

1. This is an application for certification in which the Board has combined a newly-certified bargaining unit, with a bargaining unit for which the union already had both bargaining rights and a recently-negotiated collective agreement. The parties now request the Board to address certain issues which have arisen as a result of the Board's combination order.

2. The facts are not in dispute.

3. For ease of reference, the applicant will be referred to simply as "the union", and the responding party will be referred to either as "the employer" or "O & Y".

4. The provisions of the *Labour Relations Act* to which particular reference will be made are as follows:

7.-(1) On application by the employer or trade union, the Board may combine two or more bar-

gaining units consisting of employees of an employer into a single bargaining unit if the employees in each of the bargaining units are represented by the same trade union.

(2) On an application under subsection (1) that is considered together with an application for certification, the Board may do the following:

1. Combine the bargaining unit to which the certification application relates with one or more existing bargaining units if the certification application is made by the trade union that represents the employees in those existing bargaining units.

• • •

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

(5) In combining bargaining units, the Board may amend any certificate or any provision of a collective agreement and may make such other orders as it considers appropriate in the circumstances.

(6) This section does not apply with respect to bargaining units in the construction industry.

II

5. On April 3, 1989, the union was certified to represent a bargaining unit composed of full-time and part-time “*mechanical maintenance employees* engaged in maintenance services and plant operations at Olympia & York Developments Limited, L’Esplanade Laurier” in Ottawa. That certification application was what is commonly known as a “raid”. The Independent Canadian Transit Union displaced the Canadian Union of Operating Engineers and General Workers which had previously been the bargaining agent for this group of employees.

6. Following certification, the employer and the new union engaged in collective bargaining to conclude a new collective agreement. The extent of that bargaining is not before us. We do know that there was a collective agreement between the parties that ran from January 1, 1991 to December 31, 1992.

7. Some time before the expiry of the 1991-92 agreement, the parties began bargaining for its renewal. On January 8, 1993, they entered into a “Memorandum of Settlement” prescribing the contents of a new collective agreement, which was to run from January 1, 1993 to December 31, 1993 (the “1993 agreement”). It is not entirely clear when this Memorandum of Settlement was ratified, but it is not disputed that the new collective agreement was for a one-year term, and was to expire on December 31, 1993.

8. In early February 1993, the Board received an application for certification, in which the union sought bargaining rights for *another* group of employees working in the same commercial complex. Accompanying that certification application was a request to combine the employee group to which the certification application related, with the employee group for which the union already had bargaining rights. The certification and combination applications were dealt with together.

9. The union's applications came on for hearing before the Board on March 22, 1993. The employer did not appear to contest the applications, or to address the form of the order which the union was seeking. (At the time, O & Y was still engaged in massive litigation, financial difficulties, and restructuring.) Accordingly, the Board disposed of the case before it as follows:

4. The employer operates a commercial complex in Ottawa known as L'Esplanade Laurier. The Transit Union currently represents a group of maintenance employees who work at L'Esplanade Laurier. The bargaining unit now represented by the Transit Union is framed as follows:

all mechanical maintenance employees engaged in maintenance services and plant operations at Olympia & York Developments Limited, L'Esplanade Laurier save and except Assistant Superintendent, persons above the rank of Assistant Superintendent, office staff, persons regularly employed for not more than twenty-four (24) hours per week, and students hired for the school vacation periods.

The most recent collective agreement between the employer and the Transit Union ran from January 1, 1991 until December 31, 1992. The parties are in the process of concluding a new collective agreement, but that agreement has not yet been finalized.

5. The certification application relates to a group of employees who are currently unrepresented. They, too, work at L'Esplanade Laurier. They occupy the classifications of: building control centre operator, heavy duty maintenance person, parking attendant, and loading dock. There are 8 such employees. The union is "certifiable" as bargaining agent for a bargaining unit of these employees, because more than fifty-five percent of them were members of the union on February 5, 1993, the certification application date.

6. The purpose of this proceeding is to add this group of 8 unrepresented workers to the group of 13 whom the union already represents, and combine the two groups into a single bargaining unit of "service workers". The Transit Union proposes that the combined unit should be described as follows:

all employees of Olympia & York Developments Limited at L'Esplanade Laurier, in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office staff, security guards, students employed during the school vacation period, and *persons for whom any trade union held bargaining rights as of February 5, 1993.*

7. This bargaining unit description consolidates the above-mentioned employee groupings into a single unit for collective bargaining purposes. It avoids fragmenting a group of building service workers into two legally distinct units, each of which would encompass only a handful of employees. And, of course, if there were two separate units, that could mean: separate bargaining, separate collective agreements, separate seniority regimes, a strike of one or other of these employee groupings at different times, and potentially two trade unions, should one or other of these employee groups choose to displace the Transit Union (as has happened before in this organization). This is not a recipe for stable or effective collective bargaining, nor (as noted) did the employer appear at the hearing to substantiate any concerns it might have about the proposed consolidated bargaining structure.

8. In the circumstances, and pursuant to section 7(2) of the Act, the Board considers it appropriate to combine the bargaining unit to which the certification application relates, with the existing bargaining unit represented by the Transit Union, to create a single combined bargaining unit framed as follows:

all employees of Olympia & York Developments Limited at L'Esplanade Laurier, in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office staff, security guards, students employed during the school vacation period, and *persons for whom any trade union held bargaining rights as of February 5, 1993.*

For the purpose of clarity, the Board notes that the emphasized portion of the combined bar-

gaining unit description is intended to avoid any conflict with bargaining rights that the Carpenters Union may have for "construction" work to which its ICI collective agreement might apply.

9. Pursuant to section 7(5) of the Act, the bargaining unit found at Article 1 of the Transit Workers collective agreement is hereby amended so that its terms encompass the now combined bargaining unit. Article 1, therefore, is amended to read as follows:

The terms of this Agreement shall apply to all employees of Olympia & York Developments Limited at L'Esplanade Laurier, in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office staff, security guards, students employed during the school vacation period, and *persons for whom any trade union held bargaining rights as of February 5, 1993.*

10. Section 7(5) of the Act also gives the Board the power to "make such other orders as it considers appropriate in the circumstances". However, in our opinion, it is unnecessary, at this stage, to make any further remedial order. It appears to the Board that the Transit Union and the employer ought first to explore, between themselves, the way in which the "added-on group" should be accommodated within the broader bargaining structure (for example, Mr. Dodd, whose work classification, we were told, involves different duties than the others). If, as seems likely, it is simply a matter of negotiating appropriate terms for the four new classifications, the parties are in the best position to determine how this will be done, and they should be able to resolve that question without further Board involvement.

[emphasis added at paragraph 4]

10. The Board was satisfied that the combination of bargaining units would not in itself cause serious labour relations problems, and that any transitional difficulties could be resolved through a process of mutual negotiations and accommodation. The Board was not disposed to make any further order under section 7(5) until the parties were able "to explore, between themselves, the way in which the "added-on group" should be accommodated within the broader bargaining structure...".

11. Since the application was uncontested and dealt with fairly summarily, no one made anything of the fact that the combination of units was occurring only a few months before the parties were scheduled to return to the bargaining table in respect of the existing collective agreement. [Section 54(1) of the Act, and Article 17.02 of the existing agreement both contemplate that collective bargaining may begin three months before the agreement is to expire - that is, as early as October 1993]. Indeed, as the Board noted at paragraph 4 of its decision, the parties had not yet finalized the terms of the 1993 agreement, so that they appeared to be in an "open bargaining period" for both groups at the time the combination order was made.

12. We might also note, parenthetically, that this was the first combination case to come before the Board as a result of legislation that came into effect on January 1, 1993. There was no established Board jurisprudence on the application of section 7, or how the result permitted by section 7 fit within the established legal framework, or how the broad discretion under section 7(5) should be exercised. Because the employer did not appear and the union did not raise the issue, no one considered whether transitional bargaining problems might be a reason to reject or postpone consolidation, or what the magnitude of such problems might be, or how section 7(5) might be employed to resolve them. These issues only surfaced later. And, of course, with the benefit of hindsight, it is evident that the labour relations considerations might well be different if the existing collective agreement had expired, or was being re-negotiated at the time of the consolidation order (what appeared to be the case), or had only a few months to run before expiry (what turned out to be the case), or had years to run before its termination. Similarly, the considerations might well be different depending on whether the situation and terms of the "add-on group" were more or less congruent with those of the employees in the existing unit.

13. In any event, following the Board's decision, the parties did exchange positions on how the "add-on group" should be treated - that is to say, how the terms of the existing collective agreement should be extended or amended to take into account the addition of employees in different classifications. *But there was no meeting to discuss these issues.* When the employer proposed a variety of changes, the union balked, and came back to the Board seeking relief under section 7(5). The union's position is as follows:

"The union submits that the only "terms" that it is obligated to bargain, given the amended scope, are those that can be directly related to the new *classifications per se* that have been added by the amendment. Other than those terms, the subsisting Collective Agreement with its terms and conditions, applies immediately upon the consolidation of the bargaining units and without any need for or requirement of negotiations".

14. The union points out that the existing collective agreement already contemplates that if a new classification is created within the defined bargaining unit, a wage rate is to be negotiated; and, in the union's submission, the bargaining exercise should not involve much more than that. The union argues that once the bargaining unit is enlarged, the employees should be entitled *automatically* to the terms negotiated for the existing group. The application of the collective agreement is largely a mechanical exercise, and the amount of "bargaining" required is minimal.

15. The employer replies that the new classifications are different. The wages are different, the hours of work are different, and the benefits are different; so it may be necessary to modify existing contract language to take into account these differences. It is one thing to add a new classification to an established configuration of "*mechanical maintenance employees*" (what the employer describes as a "quasi-craft unit"). It is quite another to add a series of new classifications that were never contemplated by the negotiating parties when they drafted the collective agreement that had been so recently concluded.

16. We will have more to say below about the substance of the parties' positions. At this point, we merely reiterate that the parties did not meet, and that there was no real exploration of these issues, because the parties disagreed on how much bargaining, if any, they were required to engage in. And, of course, that question has become more complicated by the fact that, whatever the parties' bargaining obligations might be, and whatever transitional arrangement the Board might be disposed to prescribe under section 7(5), the existing collective agreement was set to expire on December 31, 1993. By the time the parties were crystallizing their dispute about the extent of any duty to bargain transitional issues, there was a full-blown duty to bargain about *any* terms of the collective agreement that *either* party thought warranted revision. Thus, any order the Board might be disposed to make under section 7(5) could be limited to the period April-December 1993, and would immediately be subject to "reconsideration" through the ordinary process of collective bargaining.

17. It is not obvious whether or how the Board should exercise its discretion in these circumstances.

III

18. As we have already mentioned, this was and is a case of first impression. There is no well established Board jurisprudence on *whether* or *when* to combine bargaining units, or on the application of a pre-existing collective agreement to employee groups who could not have been contemplated at the time that agreement was entered into. Issues of this kind have been canvassed in other jurisdictions [see, for example, the views of the Canada Labour Relations Board in cases such as: *Teleglobe Canada*, 32 d.i. 270; *Premier Cable System Ltd.* (1981) 45 d.i. 221; *Canadian Broadcasting Corporation* (1982) 50 d.i. 141; *Canadian Broadcasting Corporation* (1984) 55 d.i. 145

quashed at (1985) 17 D.L.R. (4) 709 (F.C.A.); *Cablevision National Ltee.* (1979) 35 d.i. 168; *Pacifique Limited* (1984) 57 d.i. 112; *Association des Employeurs Maritimes* (1987) 71 d.i. 77; *Canadian National Railways* (1982) 44 d.i. 170; *Marine Atlantic Inc.* (1990) 82 d.i. 91]; however, the results in these cases are somewhat uneven, and do not provide an unfailing guide to the way in which the Board should approach section 7. There are a variety of choices: combine and integrate the add-on group into the existing agreement making such changes as appear appropriate; defer combination until the termination of the existing agreement at which time the two groupings, now combined, can proceed into bargaining together; terminate the existing agreement so bargaining can begin immediately for the enlarged group, etc. But there is little guidance as to which choice is the best one in particular circumstances. Nor has the Board had much experience with the labour relations consequences of the various choices.

19. The thrust of section 7 is clear enough: broader-based bargaining structures are desirable in a variety of circumstances for reasons outlined in the Statute itself, and in cases such as *Premark Canada Inc.*, [1993] OLRB Rep. June 540, *Mississauga Hydro-Electric Commission*, [1993] OLRB Rep. June 523, and *Kingston Access Bus*, [1993] OLRB Rep. July 610. In each of these cases, the Board considered it appropriate to combine bargaining units, so as to create a larger one for collective bargaining purposes. However, the Board has not yet settled either the “mechanics” of section 7, or the way in which the policy it expresses should be squared with other statutory policies - most particularly, the legislative choice of free collective bargaining as the preferred method of resolving workplace issues.

20. We think it is fair to say, though, that neither the scheme of the Act, the language of section 7, nor the existing “consolidation cases” presume that the terms of an existing collective agreement will automatically be extended to the add-on group. That is what happens in the construction industry where a newly-certified employer becomes bound automatically to the terms of the provincial ICI collective agreement. But, there is no equivalent provision under section 7. Nor has this been the Board’s assumption, as the panel observed in *Premark*:

32. The employer has taken the position that fragmentations is not an issue in this case. While we agree that fragmentation is not at issue in the same sense as it was in cases such as *Kidd Creek Mines Ltd.*, [1984] OLRB Rep. Mar. 481 and *Stratford General Hospital*, [1976] OLRB Rep. Sept. 459, nevertheless the statute requires us to consider whether in combining bargaining units, fragmentation will be reduced. Although the northern bargaining unit is an appropriate bargaining unit, it appears to us that the larger bargaining unit makes more labour relations sense. If two separate bargaining units are retained, the union’s concerns with regard to consistency in the terms and conditions of employment of individuals performing the same work could be borne out. In addition, clearly the job opportunities of the three individuals in the northern bargaining unit would be restricted and there could be a potential for jurisdictional disputes. If the two bargaining units are combined it will obviously reduce fragmentation.

33. The final factor to be considered by the Board in this case is whether combining the two units would cause serious labour relations problems. The employer has expressed concerns that combining the bargaining units would do so. Once again it appears to us that the concerns expressed by the employer relate more to the apprehension that it will not have an opportunity to bargain with the employees in the northern bargaining unit if the Board issues a combination order. Clearly the legislation provides that the Board is to consider whether combining bargaining units would cause serious labour relations problems and if we conclude that a combination order would do so, we may decline to combine the bargaining units. The serious labour relations problems referred to in section 7(3)(c) must flow from the act of consolidation and must be considered by the Board before it concludes that it is appropriate to issue an order combining bargaining units. In the case before us the employer’s concerns flow from the assumption that the Board will direct that the employees in the new combined bargaining unit will receive all of the rights enjoyed by the employees currently in the southern bargaining unit who are covered by the collective agreement. While the change in bargaining unit structure which results from a combination of bargaining units could cause serious labour relations problems which would

cause the Board to conclude that a consolidation order is not appropriate, the evidence before us in this case does not support such a finding.

34. The union in this case seeks a consolidation order. It also seeks a direction from the Board that the three individuals in the northern bargaining unit are to be rolled into the southern bargaining unit and that their employment will henceforth be governed by the terms and conditions of the collective agreement in existence covering employees in the southern bargaining unit.

35. After having carefully reviewed the evidence before us and the submissions of the parties, we conclude that it is appropriate to consolidate the two bargaining units in this case. Therefore, the Board declares that the two bargaining units in issue here are combined.

36. We decline to order that the collective agreement in existence between the parties will automatically apply to the employees formerly in the northern bargaining unit. Although section 7(5) gives the Board the authority to "amend any provision of a collective agreement" or to "make such other orders as it considers appropriate in the circumstances" we do not feel that it is appropriate to make any further remedial orders at this point. The employer has expressed concerns with the Board inserting itself into the collective bargaining process and the resultant loss on the part of the employer and the union of the opportunity to bargain the terms and conditions of employment for the employees formerly in the northern bargaining unit. We too have concerns and feel that it is appropriate to provide the parties with an opportunity to resolve the results of the Board's consolidation order without further Board involvement. We therefore refer this matter back to the parties to provide them with the opportunity to resolve if possible, the manner in which the three employees from the northern bargaining unit are to be dealt with under the new bargaining unit structure. We will remain seized with regard to any further remedial relief.

21. The cases under section 7 do not presume that the add-on group will necessarily or automatically receive the same terms as the employees for whom the union already has bargaining rights. Indeed, in none of those cases did the Board even amend the recognition clause of the collective agreement. On its face, the focus of section 7 is bargaining *structure*, not the contents of the bargain, and, to date, that is all the Board has dealt with.

22. In all of the cases under section 7, the presumed starting point has been a process of bargaining. Before considering the exercise of its discretion under section 7(5), the Board has required the parties to explore their own solutions for whatever transitional difficulties might arise from the combination of bargaining units. That is the view that we expressed in the instant case, and it is consistent with the position taken in later cases.

23. It also seems to work. Since January 1993, the Board has made quite a number of consolidation orders (mostly on agreement), and not one of them has come back to the Board. We do not know the particular circumstances of these files, but experience seems to suggest that if the parties put their minds to it, they will find that the transitional problems are not as intractable as the applicant here suggests they are.

24. What is the content of the bargaining that should precede any request for an order under section 7(5)? We do not think that it is either desirable or possible to be too definitive about that. But at the very least, it should encompass the kind of reasonable efforts and full, rational discussion that have always been part of the "section 15" duty to bargain.

25. This is not a particularly novel or onerous standard. It is one that has always been applied to "bargaining" under the Act, even in contexts where interest arbitration is prescribed to resolve any resulting impasse (as in hospitals, for example). It is also worth mentioning, that it is the kind of bargaining exercise in which the parties here would have had to engage, even if the Board had not combined the two bargaining units.

26. If the Board had dismissed or deferred the combination application, the parties would have had to bargain in respect of the newly certified group under section 15, and could not have ignored the existence of the recently-negotiated collective agreement applying to employees working in the same complex. They would have had to negotiate a collective agreement that takes into account the presence of a contiguous employee grouping in the same workplace, and if they had been unable to do so on their own, they might have moved into a process of "first contract arbitration" - which likewise would have had to take into account the relationship of the newly-certified group to the existing one. In other words, if no combination order had been made, the parties would have had to explore, through bargaining, a joint resolution of their labour relations concerns - including the relationship of the new group to the existing one. And, in the Board's view, a similar bargaining process should at least be the starting point for the exercise of the Board's discretion under section 7(5).

IV

27. Whatever the precise content of the bargaining envisaged in this case or the cases referred to above, it is evident that it has not occurred here. The parties' disagreement about the extent of their obligation to bargain, has resulted in a situation where there has been no real negotiations at all - even though, by now, the old collective agreement has expired and the section 15 bargaining obligation may have been triggered in respect of the combined bargaining unit. The parties did not even meet, let alone canvass the rationale for their respective positions.

28. Was the employer's opening position so extreme, outrageous, or patently unreasonable, that the union was relieved of any obligation to meet and discuss it? We do not think so; and while we must be somewhat circumspect about the substantive issues which divide the parties, it may be appropriate to briefly mention some of the items in dispute.

29. The employer initially suggested (it has abandoned that position) that another group of newly-certified employees be covered by the same collective agreement - thereby avoiding repetitive bargaining and some of the problems to which the Board adverted in its combination decision at paragraph 7. The employer suggested that if it made "labour relations sense" to extend the unit and the agreement to one newly certified group, it made equal sense to consider its extension to another newly certified group.

30. That is not a position which could have been pressed to "impasse" in "ordinary collective bargaining". But extensions of this kind are not prohibited, nor is the employer's suggestion particularly surprising in the context of this case. The labour relations rationale for the employer's position was precisely the same as that advanced by the union to support the consolidation of bargaining units in the first place. There is nothing offensive or unreasonable about the employer's proposal - although, of course, the union was free to reject it.

31. In the employer's submission, a change in bargaining structure should not automatically oust the bargaining process which would normally follow certification. The employer looks at the effect of the combination on the collective agreement in terms of impact cost and overall administrative efficacy. From its perspective, there is more to it than simply adding a few job titles and wage rates to existing schedules. The employer asserts that the hours of work, shift schedule, standard workweek, and skills of the add-on group are different from those of the employees in the pre-existing bargaining unit. The employer asserts that it is therefore necessary to negotiate changes that will reflect the differences and ensure that the application of the agreement will not result in anomalies or windfall wage increases when overtime and shift premium language are applied to persons for whom it was never intended.

32. The employer asserts that the rote application of the existing terms to the add-on group, will result in wage increases beyond anything that is currently being negotiated in today's economy or would likely have been prescribed in a negotiated or arbitrated "first contract". Arbitrary application of the existing contract terms could also produce a result quite different from what the parties would likely have negotiated *for the extended bargaining unit*. Bargaining, on the other hand, will yield a result which more closely approximates what the parties would have arrived at had the units been consolidated when the last collective agreement was concluded. In the employer's submission, that is the way to harmonize the legislative encouragement for broader based bargaining, and the legislature preference for free collective bargaining as the mechanism for settling the terms of a collective agreement.

33. The employer wants to examine the existing job posting/seniority language in light of the new classifications and skill mix. The current scheme involves a mix of unit and classification considerations, and obliges the employer to go to the union for new hires. The employer says that this arrangement may not fit the new bargaining unit configuration.

34. The employer has not had grievance/arbitration difficulties under the old collective agreement. But the employer anticipates that there might well be such problems under the hybrid created by the combination order. The employer therefore proposes a single arbitrator model rather than the three-person panel envisaged in the old agreement, pointing out that a single arbitrator is faster and cheaper, and reflects the preferred model prescribed in the statutory amendments that came into effect in January 1993. In the employer's submission, there is nothing sinister about this proposal. It simply wants a faster and cheaper process to resolve problems that are now more likely to arise.

35. The employer submits that there are practices which might amount to an estoppel that should be dealt with in express language. It is not at all clear how "estoppels" from the old agreement may apply to the add-on group, but the employer wants to talk about that.

36. The employer also points out that, for example, the life insurance benefit for the add-on group is *superior* to that contained in the collective agreement, so that these, and perhaps other benefits, will have to be harmonized. Just as the employer resists a "windfall" for the add-on employees, through the application of clauses never negotiated with them in mind, so, too, the employer resists a scenario which would automatically deprive those employees of superior benefits.

37. We do not think that it is necessary to multiply the examples or prescribe the precise content of the bargaining which should have taken place. Obviously, certain features, such as "just cause" or "union security" flow from the Statute itself, so there may not be much to bargain about. Other terms, however, might have to be tailored to reflect the particular labour relations environment which could not have been foreseen when the agreement was concluded. The employer's initial proposal may well have been over-reaching and somewhat exaggerated, but that is not at all unusual for an opening position, and is no reason not to meet to discuss it.

38. In all the circumstances of this case, including the absence of any serious discussion about the issues, and the imminence of full-fledged bargaining for the combined unit, the Board is not prepared at this point to make any direction under section 7(5) of the Act.

39. As before, this panel will remain seized in the event the parties are unable to work out any transitional difficulties arising from the Board's combination order.

1. I concur.

2. This case, as do all section 7(2) cases of certification involving combination with an existing bargaining unit, poses a number of issues which in the circumstances may or may not demand an answer. I agree that none of the cases received by the Board to date, especially the facts of this case, should lead a trade union applicant to presume that the terms of an existing collective agreement will automatically be applied to its newly certified unit. No doubt, employees signed cards fully expecting to be covered by negotiated terms and conditions of work rather than those granted by the employer. They were likely less concerned with the structure of bargaining than the result when they signed up. It is structure essentially with which section 7 deals although it is open to the Board, presumably, to give effect to a re-structuring, if necessary, by such remedies as orders to bargain in good faith, early termination of the existing collective agreement, and perhaps directing the settlement of a "first contract" by arbitration for the newly certified group.

3. Here, I cannot find that the parties have reached an impasse so as to require the Board's intervention in such a pre-emptive manner. At the time of making this request, the parties had not met and were close to opening negotiations for the renewal of the existing collective agreement. They simply had not made the effort to canvass the differences between them face to face.

4. It is preferable in these circumstances, therefore, that the parties assume the responsibilities of collective bargaining and fully explore the manner and extent of the application of existing or modified terms to the new unit before turning to the Board.

4506-93-JD Electrical Power Systems Construction Association and Ontario Hydro, Applicants v. International Brotherhood of Electrical Workers, Local 1788, Canadian Union of Public Employees, Local 1000, Responding Parties

Construction Industry - Jurisdictional Dispute - Practice and Procedure - Board reviewing general situation of jurisdictional disputes involving Ontario Hydro, CUPE Local 1000 and various construction unions with a view to constructing more economical, expeditious and perhaps global resolution of the disputes - Board neither processing nor scheduling new applications pending completion of its review

BEFORE: *R. O. MacDowell*, Alternate Chair, and Board Members *F. B. Reaume* and *J. Redshaw*.

DECISION OF THE BOARD; May 11, 1994

1. These are jurisdictional dispute proceedings brought under section 93 of the *Labour Relations Act*. In each case the Board is asked to decide which of the union parties should be assigned to perform certain work.

2. These applications are part of a much broader dispute about the way in which work is assigned by Ontario Hydro. That dispute is extensive and escalating. Indeed, the Board has been advised that there may be as many as 200 (or more) similar work claims, involving different craft unions and different bodies of work. Quite a number of such applications have already been filed; and the Board has been informed that there are many more to come. And, of course, under the

Rules, each new application generates onerous and expensive pleading obligations - whether or not the case ultimately proceeds to litigation.

3. This dispute is unique in a variety of ways, including: the number of identity of the parties involved; the provincial scope of Hydro's operations; the nature of the issues (some of which may involve "constitutional questions"); the sheer magnitude of the potential litigation; and the potential cost to the parties *and the public*.

4. It is not obvious to the Board that this dispute can, or should be, resolved by piecemeal litigation of individual applications, or that the normal hearing/consultation format is the most appropriate one. In the circumstances, if there is to be litigation, it is not obvious that the timetable should be governed by the vagaries of filing. Nor is it apparent that the existing *Rules* are well suited to handle a dispute of this dimensions. The Board is also aware that if the litigation commences and continues, the Board's own Rules and Procedures, will probably become a "tactical" weapon to be used by one party or the other to advance its interests.

5. In the circumstances, the Board has decided that it should review the general situation with a view to constructing a more economical, expeditious, and perhaps global resolution of the dispute. In the meantime (and pursuant to Rule 22) the Board will relieve responding parties from strict compliance with the Rules respecting Replies, and will neither process nor schedule for hearing/consultation new applications filed after this date. Similarly, the Board will adjourn related proceedings (for example applications under section 126 of the Act) which appear to be part or an aspect of the same general dispute.

6. Unless the parties are able to compose their differences, it may well be necessary to litigate some number of these applications. But until the Board has had an opportunity to review the situation and consider the best disposition of its own hearing resources, there will be a brief "moratorium".

7. When the Board has completed its review, the parties will be so advised.

8. In the course of that review, the parties or their counsel may be invited to make submissions on particular cases, issues, or dispute settlement mechanisms.

1191-89-U Antoine A. Plennevaux, Applicant v. Labourers International Union of North America, Local 1036, Responding Party

Duty of Fair Representation - Practice and Procedure - Reconsideration - Unfair Labour Practice - Board declining applicant's request to provide him with copy of chair's hearing notes - Reconsideration application dismissed

BEFORE: *Judith McCormack*, Chair.

DECISION OF THE BOARD; May 9, 1994

1. This is an application for reconsideration which relates to a decision issued on December 10, 1990, [reported at [1990] OLRB Rep. Dec. 1314]. In that decision, the Board found that

the respondent union had not violated what was then section 69 [now section 70] of the *Labour Relations Act* and dismissed the complaint.

2. In his request for reconsideration the applicant asks for a certified copy of the Chair's notes of the original hearing so that he can ask the Crown to study them to assess whether perjury charges can be laid against the union. This is apparently based on his view that union witnesses were not truthful at the hearing of this matter, which occurred in October of 1990. He also asserts that he was libelled in that he was accused of threatening people, and expresses the view that the decision was wrong in finding that he broke one of the union's bylaws by soliciting his own work or in relying upon it. Finally, the applicant states that in August of 1993, he requested and was denied a list of the occupational qualifications filed for each union member in the local.

3. Turning first to Mr. Plennevaux's request for my notes, it is useful to clarify the role of notes taken by panel members in the Board's hearing process generally. They do not constitute a transcript or record of the proceedings and have no official status or role whatsoever. Rather, they are merely personal memory aids to assist panel members in their subsequent deliberations. They may contain references to testimony and they may not. Indeed, there may be cases where few or no notes are taken. Since they are entirely for the personal use of the adjudicator who takes them, it is left to the discretion of each panel member whether to take notes at all and what, if anything, to put in them. Among other things, this means that the notes in question are likely to be of little value to the applicant for the purpose he cites, since they are not a verbatim transcript of the evidence in his case.

4. In addition, there are important public policy considerations involved. Notes taken by panel members are inextricably linked to the Board's thought processes and mental deliberations. They may record tentative or preliminary reactions and assessments which may be subsequently changed. This is particularly true in a tripartite system, which involves a joint discussion and decision-making process. It is not an overstatement to say that delivering up the Board's notes would be an invasion of the delicate and confidential nature of decision-making.

5. In *Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-69 et al.* (1985), 51 O.R. (2d) 481 (Div. Ct.) the Court referred to notes and draft decisions in the same breath in commenting on the harm to the process:

Apart from being contrary to the procedure and traditions of this court, the effect upon this and other boards of the precedent that we were asked to establish would be incalculable. Who is to say how many drafts of any particular judgment or decision may have been prepared before the final document issues? If a full draft, why not brief memoranda prepared in contemplation of a draft? If such memoranda, *why not notes taken by board members in the course of their hearing or their private and personal deliberations?* No justification for such an order can be shown, at least in the present case. In any event, the thrust of the attack on the decision of the board is as to the procedure adopted, and the fate of the application should depend on our review of that procedure, not the contents of a particular document.

(emphasis added)

6. While notes are an important memory aid for most adjudicators, particularly in lengthy and complex cases, they are also highly personalized. Among other things, they may include initial or passing thoughts undiluted by the overall perspective of the case the adjudicator will ultimately possess. If the Board produced its notes to the parties, this would be likely to restrict or change the nature of note taking significantly. The effect may be to diminish the value of the notes to the adjudicator, and to hinder or interfere with the hearing or decision-making process in this respect as well.

7. Moreover, the Board's notes may often be misleading or meaningless to the parties. For example, they may be illegible or in various shorthand forms. There is also no way of knowing why a note was made of one point and not another. Notes may be made because the adjudicator agreed with a point, disagreed, thought it was significant, thought it was so insignificant that he or she would need a note to even remember the point, and so forth.

8. The Board issues reasons for its final decisions, in some cases, routinely, and in others, upon request. Those reasons set out the basis on which the Board has reached its conclusion. They contain all the information about the decision-making process to which a party is fairly entitled. The release of notes even for a purpose unrelated to its proceedings would create a precedent which would be highly problematic, and which has the potential to erode the high standard of administrative justice reflected in the Board's proceedings. As a result, I decline to provide a copy of my notes, certified or otherwise, to the applicant.

9. Turning next to Mr. Plennevaux's reference to libel, he has not asked the Board to adjudicate or take any action, nor does the Board have any jurisdiction to do so. For his clarification however, I note that the original decision indicates that Mr. Suppa did not testify that Mr. Plennevaux had threatened anyone, but only that a representative of Stone and Webster had referred to this in telling Mr. Suppa the company did not want to hire him. The Board made no finding with respect to whether such threats were made, as this was not relevant to the complaint.

10. The applicant's reference to breaking a bylaw appears to relate to these portions of the decision:

9. At approximately 9:30 a.m., Mr. Emsley, the three men from London, and Mr. Plennevaux arrived at the respondent's office. Mr. Suppa directed the London men to Roberta Peron, the respondent's office secretary, to complete the necessary paperwork for their transfers. In the meantime, he and Mr. Plennevaux discussed his situation. Mr. Plennevaux said to Mr. Suppa "you caught me, Billy, you can't blame me for trying". This was apparently a reference to the respondent's by-laws which prohibit members soliciting work on their own, rather than being referred by the respondent. Mr. Suppa and Mr. Plennevaux talked about the fact that Mr. Plennevaux was not supposed to be soliciting work, that he knew better, and that he knew the proper way to go about it. At this point, Ms. Peron came to Mr. Suppa and told him that there were three men wishing to transfer from London rather than two. Mr. Suppa then spoke to Mr. Emsley and pointed out that they had agreed that two men would be allowed to transfer in, that he didn't care which two they were, but that there would only be two. He then went and spoke to Mr. Plennevaux again while two of the three men from London filled out all the papers and deposited their transfer cards. When this was done, Mr. Suppa instructed Ms. Peron to issue referral slips to them.

* * *

24. Finally, I do not find that Mr. Suppa's chastisement of Mr. Plennevaux reflects any animosity towards the latter, or dominated Mr. Suppa's conduct toward him. By soliciting his own work, Mr. Plennevaux had broken one of the respondent's by-laws, and it is readily apparent that if such a practise were to become widespread, the respondent's hiring hall would become undermined to a very significant degree. There was no evidence that Mr. Suppa's reaction was excessive, or indeed anything more than simple irritation. Not only did he immediately refer Mr. Plennevaux to Stone and Webster when the request for cement finishers came in, but the respondent filed and pursued a grievance on the complainant's behalf when Stone and Webster refused to hire him. There is nothing about these events which suggests that the respondent acted towards Mr. Plennevaux in a manner that was arbitrary, discriminatory or indicative of bad faith.

11. Mr. Plennevaux is of the view that whether or not he broke a bylaw is not the concern of the Board. This is quite true in the sense that the Board in this case was not addressing whether

or not Mr. Plennevaux violated any part of the *Labour Relations Act* by soliciting his own work or breaking a union bylaw. However, this evidence was relevant to Mr. Plennevaux's allegations that the exchange described above between Mr. Suppa and himself reflected an attitude on the part of the union toward him which was in violation of the duty of fair referral. The Board found that Mr. Suppa's irritation related to Mr. Plennevaux's soliciting his own work in breach of the bylaw, rather than to underlying animosity, discrimination or bad faith.

12. Finally, it appears that Mr. Plennevaux's request for the classification listings of local members relates to evidence given at the hearing and recited in the decision that "[m]embers may check the out-of-work list at any time during office hours". Assuming, without finding, that Mr. Plennevaux made such a request, I do not find it suggests that the union witnesses lied at the hearing about whether the members could check the out-of-work list. In the first place, it is not clear that checking the out-of-work list, and obtaining a list of classifications for all members amounts to the same thing. In addition, Mr. Plennevaux's request appears to have been made almost three years after this evidence was given, during which time the practice of the union may have changed. The union may find it useful to provide the information listed; at this point, however, that is up to the union.

13. As a result, the application for reconsideration is dismissed.

4305-93-OH Mark Desipio, Applicant v. Precision Engineering Company division of PECO Tool and Die Ltd., Responding Party

Discharge - Health and Safety - Applicant alleging that he was discharged, contrary to *Occupational Health and Safety Act*, as reprisal for having made certain complaints about availability of gloves at his workplace and/or because he had developed dermatitis as result of performing work without gloves - Employer affirmatively establishing that applicant terminated for reasons unrelated to health and safety matters - Application dismissed

BEFORE: Pamela Chapman, Vice-Chair, and Board Members D. G. Wozniak and H. Peacock.

APPEARANCES: Mark Desipio, applicant; Neil Sommer and Margaret Dixon for the responding party.

DECISION OF THE BOARD; May 9, 1994

1. This is an application under section 50 of the *Occupational Health and Safety Act* by Mark Desipio ("the applicant"), formerly an employee of the responding party Precision Engineering Co. ("the company"). He alleges that he was discharged from the employ of the company as a reprisal for having made certain complaints about the availability of gloves at his workplace, and/or because he had developed dermatitis as a result of performing his work without gloves.

THE FACTS

2. The applicant was hired to work as a spot welder at the company on May 10, 1993, along with several other new employees hired through the "Jobs Ontario" programme. The company makes auto parts out of steel, and these employees were hired to work on a new specialty

product welding together very small stampings into somewhat larger, but still quite small, components. The applicant, like the other employees, was hired into a three month probationary period.

3. During the first two months of the applicant's employment he was engaged in familiarization and then training on the various welding machines and the components to be assembled. After completion of his training he was assigned to complete spot welds on several different components on various welding machines, as well as to "rework" faulty parts. Assembly of some of the components involves several welders each welding a different piece, while other parts are completed by one employee working alone.

4. The components assembled by the welders come off a press where they are stamped out of rolled steel. The evidence disclosed that the rolls of steel are coated in a light machine oil when they arrive at the company, in order to prevent corrosion. During the stamping process, the steel is then sprayed with a mixture of water and an oil-like substance called Tuf Draw 1919 ("Tuf Draw"), in a ratio of approximately 15 or 20 to 1, depending on the nature of the component. After stamping, the components are stacked in bins for some time before being welded by the employees working on assembly.

5. There was some dispute in the evidence as to how much Tuf Draw and/or machine oil remains on the parts when they are handled by the welders. The company produced several parts for examination by the panel, including assembled components and raw parts before welding. Edmund Sobon, the welding operations supervisor at the company, testified that he had collected these parts on the morning of the hearing, and that he took them directly from the assembly line and the press respectively. He and Vishnu Ramnarine, the process engineer, also testified that the amount of residue on these parts was typical of the amount to be found generally on similar parts at the respective stages of production at which they were removed from the plant. On examination, there was very little oily residue on the parts the panel handled - enough to adhere to the skin but not enough to drip off the parts - with slightly more on the raw parts than on the welded parts.

6. The applicant, however, testified that there was normally much more oil-like residue on the parts which he handled as part of his job duties than on the parts which were provided to the panel. We are inclined to prefer the evidence of the company's witnesses on this point, particularly as it is corroborated by the report of a health and safety inspector from the Ministry of Labour who inspected the workplace on October 12, 1993 as a result of an anonymous complaint about employees getting a skin rash from oil on the parts, made after the applicant was terminated. In this report, which was entered as an exhibit, the inspector found that "there was very little amount of oil on the parts".

7. It was not disputed, however, that repeated handling of the parts during the assembly process does lead to a build-up of the Tuf Draw and water mixture on employees' hands. As a result, and also to protect employees' hands from sharp metal edges and filings, the company stocks certain gloves which are made available for employees' use. Four different kinds of gloves were entered into evidence: plain cotton gloves, stretchy and therefore more form-fitting cotton gloves, cotton gloves with suede palms, and rubberized cotton gloves. The employees are not required to wear gloves but can do so at their option.

8. The company's witnesses testified that each type of glove is readily available to employees and that there is no restriction on the number or type of gloves used by an employee. Stocks of the gloves are kept in the shipping office, and some pairs are also kept in the work areas. While the applicant did not directly dispute this evidence as to availability, he did suggest that only the plain cotton gloves, and some old cracked pairs of the rubberized gloves, were in plain view in his work area.

9. When he began work with the company, the applicant wore either plain cotton gloves, the same gloves with the fingers cut off, or no gloves at all, while performing his duties. He testified that he chose these options as he could not manipulate the small parts wearing more bulky gloves and the weather was quite hot. On cross-examination, he agreed that he liked the feeling of having the residue coating his hands as it was cooler and more comfortable, and would thus wear no gloves or let the residue soak the cotton gloves through repeated wearings. He added, however, that he did not know at that time that the Tuf Draw would give him a rash on his hands. There was no dispute that repeated wearings of the same cotton gloves would eventually lead to saturation of the gloves with the Tuf Draw and water mixture, although the company's witnesses testified that this would take about a week and the applicant asserted that it would happen much more quickly. The applicant did try using the suede gloves at some point, and found that while they were more resistant they too were eventually saturated.

10. On July 26, 1993, before going in to work at 7:00 a.m., the applicant noticed a rash on both of his hands, which he described as large red bumps. When the rash continued to spread, he complained to management at the company and was excused from his duties at approximately 9:30 a.m. to see a doctor at a walk-in occupational health and safety clinic. The rash was diagnosed as dermatitis, and the applicant was told that it was caused by a chemical reaction. The report provided by the doctor recommended that he remain off work for seven days and advised that he should wear impermeable gloves in the future. The applicant received Workers' Compensation benefits while he was off work.

11. There was some dispute as to how many supervisors the applicant spoke to about his condition before leaving the workplace that day, and also as to how visible it was. It was not in dispute, however, that by the time the applicant returned to work on August 9, 1993 his supervisor Sobon, the plant manager Allan Bradshaw, and the operations manager Fraser Dimma were all aware that he had gone off work because of a rash on his hands.

12. While off work, the applicant contacted Sobon and asked for a copy of the Material Safety Data Sheet ("MSDS") on the oil-like substance on the parts. He was provided with an MSDS on Tuf Draw which was admitted into evidence. A different version of the MSDS on this product was also entered by the responding party during its case. It appears from a review of these two documents, and was confirmed by the evidence of Sobon, that the one provided originally to the applicant was a 1990 version of the MSDS and the other one is a 1992 update. There are no significant differences between the two documents: both indicate that prolonged or repeated skin contact with Tuf Draw may remove natural oils and cause irritation, and that sensitive or dry skin may be aggravated by over-exposure. Oil impervious gloves are recommended to be used as required to avoid prolonged or repeated skin contact.

13. The applicant advised his supervisor, and his doctor's report confirmed, that he would need to wear impermeable gloves in order to prevent recurrence and to promote healing of the existing rash. When he returned to work, the applicant brought with him latex surgical gloves which he had purchased at a drug store. Sobon told him that he would look into having the company purchase more of these gloves for his use if they proved to be suitable. Both Sobon and the applicant agreed, however, that these gloves did not work out as they tore easily and often on the metal edges of the parts. The applicant asked for, and was provided with, pairs of the rubberized gloves, which he wore until his termination. He testified that these gloves were completely impermeable, and that his rash got no worse, although no better, during the remainder of his employment.

14. There was a dispute, however, between Sobon and the applicant as to how many pairs

of the rubberized gloves he asked for and what he was told he could have. Sobon stated that he told the applicant that he could use as many pairs of the gloves as he needed. While cross-examining him, the applicant disputed this statement but did not attribute any specific response to Sobon. In his testimony, however, the applicant suggested that Sobon said that he could have only three pairs of rubberized gloves per week. He claimed to need a new pair every day as he was using cream for his rash and needed to keep his hands clean. On this point, we must prefer the evidence of Sobon, both due to the applicant's failure to raise this alleged contradiction when the evidence first came out, and also because the applicant's testimony is to some extent a contradiction of the allegations contained in his application. On page 2 of Appendix "B" to the application, the applicant describes his return to work on August 9, 1993 and says "I also found that the company had supplied him (sic) with big rubber gloves. I had no problem with the gloves." There is no allegation in this paragraph, or indeed anywhere in the complaint, that Sobon or any member of management limited the number of pairs of rubberized gloves to which the applicant had access, or any allegation that the number of pairs provided was inadequate for the needs of the applicant.

15. After his return to work August 9, 1993, the applicant asked Sobon whether or not he would be continued in employment after the end of his probationary period, and Sobon replied that he would be discussing this with Allan Bradshaw, the plant manager. It was not disputed that on August 16, 1993, Sobon informed the applicant that his employment was being terminated. The evidence of Sobon and the applicant as to the reasons given for the termination was, however, quite contradictory.

16. Sobon testified that the performance of the applicant had been unsatisfactory throughout his probationary period, and that as a result he formed the conclusion, in consultation with Ramnarine and Bradshaw, that the applicant was unsuitable for the position. He had a number of complaints about the performance of the applicant: his productivity was generally below the average of that of other employees on the same machines, was erratic and did not improve consistently with experience; he did not get along well with co-workers, resulting in friction in the workplace and interference with assembly line projects; he demonstrated a poor attitude, often complaining about tasks and trying to avoid those he did not prefer; and he failed to live up to overtime commitments after making them. These opinions were echoed by Ramnarine, the process engineer, who was responsible for training the applicant and the other employees hired to work on this specialty part. He in fact reached the conclusion that the applicant was unsuitable for the position after the first month of training, and testified that he communicated this opinion to Sobon and Bradshaw at that time. According to Sobon, however, he wanted to give the applicant as long as possible to demonstrate his suitability, particularly as the applicant sometimes worked with sufficient speed and concentration to meet the expectations of the position. When the applicant went off work with the rash from July 26 to August 9, 1993, Sobon decided to extend his probationary period for one further week in order to give him a final opportunity to improve. In his view, however, the applicant did not improve and he therefore decided, after consultation with Bradshaw, to terminate his employment with the company.

17. The applicant had quite a different version of his termination by Sobon. He testified that on August 16, 1993, after repeatedly asking Sobon for a decision as to his status, Sobon advised him that he was not suitable for the position because of the condition of his hands. This was put to Sobon on cross-examination by the applicant, and he denied having cited the applicant's hands as a reason for his dismissal. Sobon did, however, say that the applicant raised the question of his hands playing a role in the dismissal, and that he told him that they had not.

18. It was certainly clear from the evidence of the applicant that he formed the opinion that Sobon had decided to terminate him because of the dermatitis, but it was equally clear that he was

already apprehensive about this before he spoke to Sobon. Thus, he may have reached this conclusion in spite of, rather than because of, what Sobon said to him in the meeting. We are also inclined to accept Sobon's stated reasons for the termination given what we learned about the timing of the decision. Both Sobon and Ramnarine testified that they had formed a negative opinion as to the applicant's suitability some time prior to him taking time off work due to the rash, although Sobon was prepared to give him to the end of his probationary period to demonstrate some improvement. No such improvement was noted. At the same time, there was no particular incident or exchange concerning the applicant's rash during the week after his return to work which would suggest that management had any particular concerns about the rash or the need for the applicant to wear gloves. Indeed, there was no evidence that they expressed any concern about these matters whatsoever, and indeed it would appear from the medical evidence produced that there would have been no reason for such concern so long as the applicant continued to wear impermeable gloves as he did that week.

19. Furthermore, the documentary evidence produced concerning production rates does support the assertion by Sobon and Ramnarine that the applicant's productivity was both erratic and below average. The applicant was given an opportunity to review the original production reports which were used to create the summary of production rates admitted into evidence, but he declined to do so. Nonetheless, he suggested in defence of the allegations concerning his productivity that the reports must have been falsified. We cannot accept this bald allegation of falsification without some evidence to support it, and therefore must find the production summaries to be accurate records of the applicant's performance. As noted above, these summaries support the company's conclusions.

20. Finally, the evidence disclosed that no complaint was made by the applicant concerning health and safety conditions at the plant prior to his termination, and that he never refused to perform work as a result of any concerns about his health and safety. As noted above, an anonymous complaint about an oil-like substance causing a rash in the welding area was made to the Ministry of Labour sometime after the applicant's termination, leading to an inspection of the workplace on October 12, 1993. After inspecting the workplace, the inspector reported that:

"...all the workers in that area were wearing PPE (personal protective equipment) also (sic) there was very little amount of oil on the parts. None of the workers in that area had any concerns with regards to getting a skin rash from handling these parts...

At the time of this inspection there were no health and safety concerns at the workplace."

ARGUMENT

21. The applicant submits that he was terminated by the company for one of two reasons: because he insisted on being provided with impermeable gloves; and/or, because he had dermatitis on his hands. Thus, he claims that his dismissal was contrary to the *Occupational Health and Safety Act* as he was asserting his rights under that Act by seeking to be provided with appropriate safety equipment and to be permitted to work with a skin condition while wearing this equipment.

22. The company, on the other hand, submits that the applicant's termination was as a result of his unsuitability for the position, assessed at the end of his probationary period. The reasons for this assessment relate to poor performance, as detailed above, and had nothing to do with either the applicant's rash, or his need to wear gloves as a result of the rash. They assert, furthermore, that they have done nothing to interfere with the applicant exercising any rights under the Act, while noting that the applicant did not raise any complaint under the Act prior to his termination.

DECISION

23. Section 50 of the *Occupational Health and Safety Act* reads, in part, as follows:

50. (1) No employer or person acting on behalf of an employer shall,

- (a) dismiss or threaten to dismiss a worker;
- (b) discipline or suspend or threaten to discipline or suspend a worker;
- (c) impose any penalty upon a worker; or
- (d) intimidate or coerce a worker,

because the worker has acted in compliance with this Act or the regulations or an order made thereunder, has sought the enforcement of this Act or the regulations or has given evidence in a proceeding in respect of the enforcement of this Act or the regulations or in an inquest under the *Coroners Act*.

(2) Where a worker complains that an employer or person acting on behalf of an employer has contravened subsection (1), the worker may either have the matter dealt with by final and binding settlement by arbitration under a collective agreement, if any, or file a complaint with the Ontario Labour Relations Board in which case any regulations governing the practice and procedure of the Board apply with all necessary modifications to the complaint.

• • •

(5) On an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the burden of proof that an employer or person acting on behalf of an employer did not act contrary to subsection (1) lies upon the employer or the person acting on behalf of the employer.

• • •

(7) Where on an inquiry by the Ontario Labour Relations Board into a complaint filed under subsection (2), the Board determines that a worker has been discharged or otherwise disciplined by an employer for cause and the contract of employment or the collective agreement, as the case may be, does not contain a specific penalty for the infraction, the Board may substitute such other penalty for the discharge or discipline as to the Board seems just and reasonable in all the circumstances.

24. Thus, the burden of proof in a complaint under this section is on the respondent to establish that it did not act contrary to the legislation. In this case, we must find that the responding party has met that burden of proof, by affirmatively establishing that the applicant, a probationary employee, was terminated for reasons unrelated to any health and safety matters.

25. It is perhaps not surprising that the applicant formed the view that his dismissal must have been related to his absence due to a rash apparently caused by contact with the Tuf Draw, or to his request for gloves to protect from further exposure, given that the termination occurred only days after his return to work. Furthermore, it was not clear whether or not the company had ever made it clear to the applicant prior to his termination that they had grave concerns about his suitability and were considering dismissing him unless there was substantial improvement.

26. We are satisfied, however, that this timing was coincidental, as the applicant's probationary period had come to an end, and that in any event the company had really reached its decision as to the suitability of the applicant prior to his absence for treatment of the rash. A careful consideration of the evidence as a whole leads us to the conclusion that the applicant was termi-

nated because it was the consensus view of management at the end of his probationary period that he had not proved suitable for continued employment due to poor performance and a poor attitude, as set out in greater detail above.

27. Furthermore, there is no evidence to suggest that the company was in whole or in part moved to terminate the applicant because he was seeking compliance with the Act. Even the evidence of the applicant about his conversation with Sobon on August 16th, which for the reasons set out above we have rejected, raises only the spectre of some concern on the company's part about the applicant's medical condition, which does not itself constitute an anti-safety animus. The applicant did not invoke the Act or the regulations at any time prior to his termination, and did not at any time refuse to work. His only conduct which can be construed as an exercise of rights under the Act was his request for a copy of the MSDS on Tuf Draw and for gloves to protect his hands from further exposure, and both of these requests were met by the company without any expression of concern or opposition. In fact, it is clear from the evidence concerning the availability of protective equipment in the workplace that the applicant's requests required no special accommodation by the employer. This was confirmed by the applicant on cross-examination, who said that the week he returned he had "no problems with the company in terms of health and safety...that was a fine week".

28. For all of these reasons, we find that there has been no violation of section 50 of the *Occupational Health and Safety Act* by the responding party.

29. While the applicant did not specifically request that the Board consider the application of section 50(7) of the Act, we note that the Board has found in previous cases that we have a discretion under that section to mitigate a disciplinary penalty, including dismissal, imposed by an employer for cause, even where there has been no violation of the Act. (See *H.H. Robertson Inc.*, [1991] OLRB Rep. April 492; *Bilt-Rite Upholstery Co. Ltd.*, [1990] OLRB Rep. July 755; *Commonwealth Construction Company*, [1987] OLRB Rep. July 961.) Having regard, however, to the lack of a collective bargaining relationship in this workplace, to the applicant's status as a probationary employee, to his length of service, to the lack of any nexus between his termination and even a purported exercise by him of rights under the Act, and to the evidence called by the company to corroborate the allegations of poor performance, we do not find this to be an appropriate case for an exercise of our discretion under that section.

30. The complaint is therefore dismissed.

2522-92-R; 2616-92-G International Brotherhood of Electrical Workers, Local 353, Applicant v. Eli's Electric Service; Town And Country Electric LTD.; Town and Country Electric; Steeles Electric; E & E Steeles Electric Ltd. c.o.b as E & E Steeles Electric c.o.b as **Steeles Electric**, Responding Parties.

BEFORE: *Jules Bloch*, Vice-Chair, and Board Members *R. M. Sloan* and *G. McMenemy*.

APPEARANCES: *Craig Flood* and *Mike Oram* for the applicant; *Ron Himelfarb*, *Eli Himelfarb* and *Mary Himelfarb* for E & E Steeles Electric Ltd..

DECISION OF THE BOARD; May 6, 1994

1. The style of cause is hereby amended to reflect the correct names of the responding parties: "Eli's Electric Service; Town and Country Electric LTD.; Town and Country Electric; Steeles Electric; E & E Steeles Electric Ltd. c.o.b as E & E Steeles Electric c.o.b as Steeles Electric". The responding parties will be referred to as Eli Himelfarb for ease of reference.

2. Board File #2522-92-R is an application pursuant to sections 1(4) and 64 of the *Labour Relations Act* ("the Act"). Board File #2616-92-G is a referral to the Board, under section 126 of the *Act*, of a grievance in the construction industry.

3. These matters first came on for hearing before a panel of the Board consisting of Vice-Chair Bloch and Board Members Fraser and Redshaw ("Bloch Panel"). At that initial hearing, the parties were represented by labour relations counsel who appear before the Board on a regular basis. After counsel for the responding parties finished his opening statement, the parties requested that the panel mediate the outstanding issues in dispute, and should such mediation fail, the parties requested that the same panel continue with the hearing of the matters on the merits. The parties signed an agreement to that effect. The agreement is reproduced below.

OLRB 2522-92-R and 2616-92-G

Between

International Brotherhood of Electrical Workers Local 353

and

E & E Steeles Electric Limited, Town & Country Electric Limited, Eli's Electric Service

The parties mutually request that the Board mediate their outstanding differences and, if such mediation efforts are unsuccessful, mutually request that the Board continue with the hearing of these matters.

Signed & Dated at Toronto this 6th day of May, 1993

"Eli Himelfarb"
E & E Steeles
Electric Limited

"Michael I. Oram"
I.B.E.W. Local 353

4. Part of the mediation involved an issue which the Board would not normally deal with in respect of either a section 1(4)/64 application or a grievance. Mr. Eli Himelfarb had been a member of the International Brotherhood of Electrical Workers, Local 353 ("Local 353" or "the Union"), however, because of a finding by a Union "Trial Board" that he violated the Union's

constitution, a fine had been levied against him in the amount of \$10,000.00. Mr. Himelfarb did not pay the fine and consequently was suspended from membership on April 4, 1988. Part of the mediation included the panel attempting to mediate the issue of whether Mr. Himelfarb should be reinstated in the Union.

5. It was the unanimous view of the panel that, assuming all the facts presented by Counsel for the responding party in the opening statement to be true, Mr. Himelfarb would have a “rough row to hoe” in respect of all three applications under the *Act*. We offered him our opinion in respect of his chances of success and we urged upon him a settlement that included the reinstatement of his Union membership. At the end of the day, the parties reported to the Panel that they had tentatively agreed to a settlement.

6. Subsequently this matter was relisted for hearing. On August 3, 1993 the matter continued before Vice-Chair Bloch and Board Members Sloan and McMenemy. The Responding Party had by then changed counsel and new counsel raised an assertion of bias against the Chair of the Panel. The parties had previously agreed that Board Members Sloan and McMenemy could replace Board Members Fraser and Redshaw. Counsel for Eli Himelfarb submitted that the original “Bloch Panel”, by expressing an opinion on the probable outcome of the case, had prejudged the case and therefore could not be an impartial trier of fact. In counsel’s view, mediation does not include a frank assessment of a party’s chances based on a party’s best evidence and the relevant jurisprudence.

7. After the parties had been given full opportunity to make oral submissions in respect of the bias motion, the Board in an oral ruling on August 4, 1993, unanimously dismissed the responding party’s motion. The following are the reasons for the August 4, 1993 decision and the decision and reasons for the matters in issue argued before the Panel in respect of the merits of the case.

8. It is axiomatic that a specialized Tribunal like the *Labour Relations Board* (“the Board”) is different from a Court. The Board has its own Rules of Procedure (see: Rules of Procedure January 1993). As well, the Board is governed by specialized legislation which was enacted to create the framework for the adjudication of matters within the exclusive jurisdiction of the Board.

9. One of the specialized features of the Board is the important role that settlement of cases plays. This is especially so in the construction industry. Both the Trade Union and the Responding Parties are governed by the construction industry provisions of the *Act*. In respect of the construction industry, the Board, in section 126 applications convenes as an arbitration panel, pursuant to construction industry collective agreements, as well as a statutory Board with exclusive jurisdiction in respect of the *Act*. (See: *Re International Association of Heat & Frost Insulators and Asbestos Workers Local 95 and Master Insulators Association of Ontario et al* (1979) 99 D.L.R. (3d) 757). This special status, by statute, includes a construction industry division within the Board (see: section 104(5) of the *Act*). There are full-time Vice-Chairs and Board Members who have specialized construction experience. As well there is a full time labour relations officer dedicated to construction industry grievances and matters related to those grievances. The construction industry has come to expect a specialized understanding, by the construction industry division of the Board, of construction industry labour relations issues. Counsel who present construction industry cases usually come from a small group of lawyers, that make up a sub-set of the general labour relations bar. These counsel have an acute knowledge of their sub-specialty, construction labour law, and consequently know how to strategically litigate a case before the Board.

10. The concept of mediation/arbitration is not a new one. In this case, both Parties

requested that the “Bloch Panel” perform the dual role of mediator and arbitrator. This request was made pursuant to or in conformity with section 126 (3) of the *Act*, which states:

126.-(3) Upon a referral under subsection (1), the Board has exclusive jurisdiction to hear and determine the difference or allegation raised in the grievance referred to it, including any question as to whether the matter is arbitrable, and subsections 45 (6.3), (8), (8.1), (8.3) and (9) to (12) apply with necessary modifications to the Board and to the enforcement of the decision of the Board.

Section 126 (3) specifically incorporates by reference, with necessary modifications, section 45 (8.1) which states:

45.- (8.1) An arbitrator or board of arbitration has the following powers:

1. To require any party to furnish particulars before or during a hearing.
2. To require any party to produce documents or things that may be relevant to the matter and to do so before or during the hearing.
3. To enter any premises where work is being done or has been done by the employees or in which the employer carries on business or where anything is taking place or has taken place concerning any of the differences submitted to the arbitrator or arbitration board and inspect or view any work, material, machinery, appliance or article at the premises and interrogate any person about any of the differences or about any work or thing.
4. To authorize any person to do anything that the arbitrator or arbitration board may do under paragraph 3 and to report to him, her or it about it.
5. To make such orders or give such directions in proceedings as he, she or it considers appropriate to expedite the proceedings or to prevent the abuse of the arbitration process.
6. To mediate the differences between the parties at any stage in the proceedings with the consent of the parties. If mediation is not successful, the arbitrator or arbitration board retains the power to determine the difference by arbitration.
7. To fix dates for the commencement and continuation of hearings.
8. To summon and enforce the attendance of witnesses and to compel them to give oral or written evidence on oath in the same manner as a court of record in civil cases.
9. To administer oaths and affirmations.
10. To admit and act upon such oral or written evidence as he, she or it considers proper, whether admissible in a court of law or not.
11. To consider such submissions provided in such form or by such method as he, she or it considers appropriate.

There is nothing in the legislation to suggest that in the course of a mediation in conformity with section 45(8.1)(6) it may not mediate related and included issues.

11. The issue of bias must be placed squarely within a specific legislative and labour relations context. Section 1 (5) and 64 (13) of the *Act* place a statutory obligation on the Responding Parties to adduce all facts within their knowledge that are material to the allegations. The Rules of the Board require that these facts be pleaded prior to the commencement of the hearing. In this

way, the Panel prior to the opening statements has a very good understanding of the Parties' best case scenarios. In this type of application, the Responding Parties present their evidence first and consequently make the first opening statement. At the end of the opening statements, the Panel is in a position to understand the true dimensions of the litigation.

12. In the case at hand, the Parties requested that the Board mediate/arbitrate the applications pursuant to section 64, 1(4) and 126. For the mediation to be effective, all three of the applications before the Board had to be settled at the same time. It is axiomatic that one can not settle a grievance without first establishing if bargaining rights exist. The Parties understood this and made their request to the Board on that basis (see the parties' written agreement).

13. For a mediation to succeed, Parties have to know the possibility of success in the litigation phase. This opinion must be based on the facts raised before the mediator and the mediator's understanding of the relevant jurisprudence, and practice as it relates, in respect of these Parties, to the construction industry. In this fashion, the Parties can decide what is in it for them in respect of settlement. Of course, settlement is also based on many intangibles, for example, the speed and cost of the settlement process in juxtaposition to the litigation process; or the mediator's ability to deal with and resolve issues that are not before the trier of fact.

14. In *Brousseau v. Alberta Securities Commission* (1989), 57 D.L.R. (4th) 458 the Supreme Court of Canada ruled that the Chairman, pursuant to the *Securities Act*, R.S.A. 1970, Chap. S.333 as amended by, had statutory authority to both investigate and adjudicate. The investigation in that instance was done by the Chair on his own motion and not with the consent of the Parties. The Court, in rendering its decision stated the following at page 464:

As with most principles, there are exceptions. One exception to the *nemo iudex* principle is where the overlap of functions which occurs has been authorized by statute, assuming the constitutionality of the statute is not in issue. A case in point relied on by the respondents, *Re W.D. Latimer Co. Ltd. and A.-G. Ont.; re Onuska and Bray* (1973), 43 D.L.R. (3d) 58, 2 O.R. (2d) 391 (Div. Ct.); Affirmed *sub nom. Re W.D. Latimer Co. Ltd. and Bray*, 52 D.L.R. (3d) 161, 6 O.R. (2d) 129 (C.A.), addresses this particular issue with respect to the activities of a securities commission. In that case, as in this one, members of the panel assigned to hear proceedings had also been involved in the investigatory process. Dubin J.A. for the Court of Appeal found that the structure of the Act itself, whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias. He wrote at pp. 172-3 D.L.R., pp. 140-1 O.R.:

Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task.

In order to disqualify the Commission from hearing the matter in the present case, some act of the Commission going beyond its statutory duties must be found.

Administrative tribunals are created for a variety of reasons and to respond to a variety of needs. In establishing such tribunals, the legislator is free to choose the structure of the administrative body. The legislator will determine, among other things, its composition and the particular degrees of formality required in its operation. In some cases, the legislator will determine that it is desirable, in achieving the ends of the statute, to allow for an overlap of functions which in normal judicial proceedings would be kept separate. In assessing the activities of administrative tribunals, the courts must be sensitive to the nature of the body created by the legislator. If a certain degree of overlapping of functions is authorized by statute, then, to the extent that it is authorized, it will not generally be subject to the doctrine of "reasonable apprehension of bias" *per se*. ...

15. In the case at hand, the Parties requested that the Board perform a dual function in regard to the matters in Board Files #2522-92-R and #2616-92-G. The *Act* specifically contemplates this type of arrangement. The agreement of the Parties, in a labour relations context, is extremely important to the legislative goal of harmonious labour relations in the Province of Ontario. As well, each time Parties can resolve their differences without litigation the Parties have a better opportunity to understand each other. This understanding will lead to less problems on the construction site as the adversarial nature of litigation will have been avoided.

16. In *Careful Hand Laundry and Dry Cleaners Limited* [1988] OLRB Rep. Dec. 1205, the Board, in dismissing a motion for apprehension of bias, restated the classic test at paragraph 6 and 7 of the decision:

6. The applicable test was framed as follows by Laskin C.J.C., speaking for the majority, in *Committee for Justice and Liberty v. National Energy Board* (1976), 68 D.L.R. (3d) 716 (S.C.C.): that a reasonably well-informed person could properly have a reasonable apprehension of a biased appraisal and judgment of the issues to be determined (p.733). The Chief Justice continued that "the test of reasonable apprehension of bias ... is a restatement of] what Rand, J. said in *Szilard v. Szasz*, [1955] 1 D.L.R. 370 at p. 373, [1955] S.C.R. 3 at pp. 6-7 [which, like the *Committee for Justice and Liberty*, involved bias based on prior association], in speaking of the 'probability or reasoned suspicion of biased appraisal and judgment, unintended though it be'".

7. The test is an objective one. It is not sufficient to find apprehension of bias in a decision-maker simply because one party states "I am afraid the adjudicator will be biased because of something she said"; on the other hand, it is not sufficient for the adjudicator to deal with the matter simply by saying "I am not biased" or "I do not think anyone should think I would be biased". An objective test is necessary to avoid both allegations and determinations which are more reflective of self-interest than actuality. The determination must therefore be based on an assessment of the impugned words, including the context in which they were made and the surrounding statements. The test is whether a person who is informed about the circumstance surrounding the event giving rise to the allegation could have a reasonable apprehension that the adjudicator will not or will not be able to determine the matters in issue in a manner consistent with providing a fair and impartial hearing.

17. The Parties in this case fully understood the dimensions of their agreement to appoint a mediator/arbitrator as the Board gave the parties time to discuss the matter prior to them signing the agreement. The Board, during the mediation process, must attempt to fashion a settlement which reflects the true potential for success or failure in the litigation phase. The mediation Panel's assessment was based on a full disclosure by the Parties of what they anticipated to be their best evidence. At an early stage it was clear there was not substantial disagreement on the salient relevant facts. In reviewing the context in which the Panel made the assessment on the Responding Party's chances to succeed, the Board finds that the Parties themselves requested this type of assessment when they asked for mediation. As well, by requesting that the Panel continue as a trier of fact and law, should the mediation fail, the Responding Party understood that the litigation would continue with the same panel. At that time and indeed right up to the next hearing date, when new counsel appeared on behalf of the Responding Party, everyone understood that the "Bloch" panel would continue as the trier of fact and law and no-one had any "bias problems" with the procedure. It was only after new counsel was retained that the issue of bias was raised.

18. The Parties made a fully informed choice about how to proceed. The Bloch Panel comported itself as a mediation panel. For these reasons, we conclude that a reasonably well-informed person would not properly have a reasonable apprehension that the Chair (or any member of the original Bloch Panel) would appraise and reach conclusions on the issues to be determined in a biased manner.

19. The case on its merits involves an assertion by the Union that there has been a sale of business, within the meaning of section 64 of the *Act*. The Applicant requested that the Board declare that the Responding Parties are all bound by their provincial agreement in the ICI sector of the construction industry in Ontario. In the alternative, the Union alleged that the Responding Employers constitute one employer within the meaning and for the purposes of the *Act* (section 1 (4)), and requested that the Board so declare, and, further, that the Board declare that the Responding Employers are therefore *all* bound by the Applicant's provincial agreement in the ICI sector of the construction industry. Further, the Applicant sought a finding, pursuant to section 126 of the *Act*, by the Board, that the Responding Parties violated the provincial collective agreement and consequently owed damages to the Applicant.

20. The Board does not regard it as necessary to recount the evidence in detail nor to set out separately the submissions of the parties. The Board has carefully considered the testimony of the witnesses and the Parties' representations and the relevant jurisprudence in reaching its decision. In the main, the evidence adduced by both Parties was compatible and did not conflict. Where necessary, in respect of conflicting testimony, the Board has preferred one person's evidence over another as set out below. This preference was based on corroborating evidence and inferences in respect of the totality of the evidence.

21. The Responding Party called five witnesses including Eli Himelfarb, a principal in all the Responding Parties and an alleged "key person"; Mary-Ellen Himelfarb, his wife and co-sharerholder in his present electrical contracting company; Murray Korman, a former business associate; Ben Swirsky, brother-in-law and former President of Bramalea Limited; and Eric Kirshenblatt, a principal in the general contracting firm of Kirkor Construction Limited. The Trade Union called two witnesses, Ron Carroll, a former business agent of the Union; and Mike Oram, a business agent of the Union.

22. Eli Himelfarb is a master electrician in the Regional Municipality of Metropolitan Toronto (roughly OLRB Board Area #8). This designation is awarded to journeymen electricians after passing the prescribed test by various Municipal Governments in the Province of Ontario. This designation allows the electrician to bid, as an electrical contractor, on certain jobs in the municipality. Eli Himelfarb was a member of the Union until April 4, 1988. At that time, because he failed to pay the fine levied against him by a Union "Trial Board", he was suspended for non-payment of dues. Between January 11, 1972, the date he signed a collective agreement as an electrical contractor in the construction industry and April 4, 1988, the date he was suspended from the Union, Eli Himelfarb paid union dues and contributed to his pension and welfare plan. These remittances were made pursuant to the appropriate collective agreement.

23. The Union approached this case as a "key person" case. That is, Eli Himelfarb was so essential to the business of the Responding Parties that his movement from company to company constituted a transfer of part of his business chronologically down the line from Eli's Electric Service through to and including E & E Steeles Electric Ltd. c.o.b. as E & E Steeles Electric c.o.b. as Steeles Electric. In the alternative, the Union asserted that each company's activities were related or associated to each other, and Eli Himelfarb had common control and direction of each company in the chain of companies. In essence, the companies were created to benefit Eli Himelfarb as a "key person" and they constitute one employer for the purpose of the *Act*.

24. To understand the facts of this case it is appropriate to review sequentially Eli Himelfarb's work history, including his interactions with the Union. Eli Himelfarb became a Union member and an apprentice electrician in 1955. From about 1955 to 1972 Eli Himelfarb was a journeyman electrician and a member in good standing of the Union. Eli Himelfarb, like any other

Union member, would receive referrals from the hiring hall and go to work on Union jobs for Union contractors.

25. On January 11, 1972 Eli's Electric Service entered into a collective agreement with the Union. Eli Himelfarb signed this agreement because the Union had a pool of trained men and he wanted access to them. As well, many of the school projects that he bid on required that the electrical sub-contractor be a union sub-contractor. On May 23, 1972, Mr. Himelfarb took on Ziggy Grinberg, a journeyman electrician, as a partner.

26. For a while they operated under the name Eli's Electric Service. However because Mr. Grinberg did not like the name they changed it to Town and Country Electric. Mr. Himelfarb notified the Union of the change of name. The partnership did mostly day care centres, service calls in the residential and commercial sectors and one school, in Keswick Ontario. The Keswick school caused a problem in the Grinberg - Himelfarb relationship and consequently they divided the tools and went their separate ways. Eli Himelfarb continued to bid under the name Town and Country Electric. Throughout this period of time the company operated out of Eli Himelfarb's home. Mr. Himelfarb's wife, Mary-Ellen Himelfarb, was responsible for the office. Mr. Himelfarb testified that he thought he signed the agreement under the name Town and Country Electric, although it is clear on the face of the Collective Agreement that he signed the agreement when he was working under the style name, Eli's Electric Service.

27. In 1973, he was the successful bidder for Balmy Beach School. Realizing that he did not have the start up capital to do the job, he went to Jacob Korman, a relative, for financial assistance. Jacob Korman agreed to provide the capital. On January 17, 1974 Town and Country Electric LTD. was incorporated. Eli Himelfarb was a minority shareholder in the relationship. Jacob Korman and his son Murray Korman held eighty percent of the shares. Eli Himelfarb held twenty per cent of the shares. Jacob Korman, Murray Korman and Eli Himelfarb entered into a shareholder agreement which outlined the duties of the three shareholders. The agreement contemplated that Jacob Korman would call the financial "shots", Murray Korman would run the office, and Eli Himelfarb would supervise and manage all work contracted for by the company. He would have the right to hire and fire workers. Further, Eli Himelfarb could not work for any outside interest, and should he leave the company prior to the completion of the contract with W.H. Massey Ltd. (the Balmy Beach School) or any other contract, damages could be assessed against him in the amount of \$10,000.00. Mr. Himelfarb notified the Union of the incorporation and the status of the company and his role in the company.

28. The testimony of Murray Korman and Eli Himelfarb is consistent. Neither Murray Korman nor Jacob Korman had any electrical contracting experience. The relationship between Mr. Himelfarb and the Korman's began because Mr. Himelfarb had an asset (the contract for the Balmy Beach School) which required financing. On the basis of Mr. Himelfarb's knowledge of the industry and his ability to estimate and bid jobs, the company was incorporated to contract in the electrical contracting field of the construction industry. Town And Country Electrical LTD. always used union labour and Eli Himelfarb was the primary contact with the Union. Murray Korman would also, from time to time, deal with the Union. Eli Himelfarb and Murray Korman, principals of Town And Country Electric LTD., testified that they were bound to a collective agreement with the Union.

29. Town and Country Electrical LTD. started to have financial difficulties. In August of 1975, Town And Country Electrical LTD. stopped doing electrical contract work in the construction industry. The company broke apart, and Eli Himelfarb returned to the hiring hall as a Union electrician. Between the end of 1975 and 1982, the "hall" referred Mr. Himelfarb to jobs in

Canada and the United States. Town And Country Electrical LTD. was dissolved on February 27, 1984. Between August 1975 and February 1984 the company served the Korman's as a corporate tax vehicle. The company did not, during that time frame, operate as an electrical contractor in the construction industry.

30. The evidence of Mary-Ellen Himelfarb and Eli Himelfarb was consistent in respect of the post 1981 events. At some point in 1982, Eli decided he wanted to become an electrical contractor again. Eli started using the name Town and Country and did some jobs under that name. Eli was responsible for the bidding and contracting end of the business and Mary-Ellen the office and clerical side of the business. The business was operated out of the Himelfarb's home address. Jacob Korman found out that Eli was operating an electrical contracting business using the name Town and Country. Jacob Korman telephoned Eli and told him that he could not use this name. Eli and Mary-Ellen decided to change the name of the business to Steeles Electric. The business was not doing very well. At some point in 1983, Mary-Ellen called her brother Ben Swirsky, who at that time was an officer of Bramalea Limited ("Bramalea"), a major developer in the province of Ontario.

31. Ben Swirsky arranged for Eli Himelfarb to be placed on Bramalea's list of invited bidders. As well, Mr. Swirsky co-signed a loan for Steeles Electric. Eli Himelfarb started tendering under the name Steeles Electric. On May 8, 1984 the company was incorporated as E & E Steeles Electric LTD. The company carries on business as E & E Steeles Electric and Steeles Electric. Eli Himelfarb is a fifty-one per cent shareholder in the company. Mary-Ellen Himelfarb is a forty-nine percent shareholder in the company. The company is operated out of the Himelfarb's home. Mary-Ellen operates the office and clerical end of the business, and Eli operates the construction end of the business. Mary-Ellen testified that she did not think she was investing in a union company. In her view, her investment in time and effort and utilization of her family contacts in connection with this company was always made on the basis that it would be a non-union contractor providing electrical services primarily to Bramalea. Between 1985 and 1990, contracts with Bramalea represented the largest dollar amounts of contracts performed by E & E Steeles Electric Ltd. In 1990, Ben Swirsky left Bramalea, and since 1990 E & E Steeles Electric Ltd. has not received any contracts from Bramalea.

32. Ron Carroll testified that on July 27, 1987 he attended at a Bramalea construction project in Bramalea Ontario. At that time he met a person who said he was an employee of E & E Steeles Electric. This person, when asked about his union affiliation, produced a union card with the name Eli Himelfarb on it. Mr. Carroll knew that this person was not Eli Himelfarb. Mr. Carroll drafted a grievance letter against E & E Steeles, however that letter was never sent. Mr. Carroll lost a union election in September, 1987 and consequently lost his position as a business representative. The new regime never followed through with the grievance. Mr. Carroll, prior to leaving office, initiated disciplinary proceedings against Mr. Himelfarb, pursuant to his attempt to allow a non-union person the use of his union card. On October 7, 1987 the executive board of the Union, sitting as a "Trial Board" of the Union, issued a decision finding Mr. Himelfarb guilty of a breach of the Union's constitution and fined him \$10,000.00. Subsequently, Mr. Himelfarb was suspended for non-payment of dues.

33. Mr. Himelfarb and Mr. Carroll met on July 31, 1987 at the Bramalea job site to discuss the situation. Mr. Carroll states that Mr. Himelfarb insisted he was a union contractor and indicated the union had told a general contractor by the name of Bonfield that Himelfarb's company was not on the union list and therefore he lost the bid on the Bonfield job because the Union had said he was non-union. Mr. Himelfarb states that he told Mr. Carroll at this meeting that he was a non-union company and although Mr. Carroll said that Bramalea was bound to a collective agree-

ment he believed otherwise. In any event he never received a grievance in respect of that job. He was disciplined for giving his Union card to an employee and that, in his mind, was the end of that incident. The only grievance he received is the instant one.

34. We find Mr. Carroll's version of the events to be the more accurate version. A non-union company would not provide its employees with union cards to show a union business agent should a union business agent come on site asking questions. Further, Mr. Himelfarb during that period of time was paying Union dues, pension and benefits. The amounts paid to the various funds are based on hours worked. As well the per hour remittance is based on a negotiated amount in a collective agreement. It was only when Mr. Himelfarb lost his status as a Union member that he stopped remitting dues to the Union and pension and benefit payments to the various funds administered by Murray Bulger.

35. This case involves either an alleged successor rights application or a related employer application or a combination of both sections. The Board, in *Pinecrest-Queensway Health and Community Services*, [1992] OLRB Rep. Nov. 1211, described the purpose and effect of section 64 and 1(4) as follows:

6. Section 1(4) applies to situations in which activities which generate employment relations governed by the *Labour Relations Act* are carried on through more than one legal entity, whether or not at the same time. This provision gives the Board the power to pierce the corporate veil and declare two or more entities to constitute one employer for purposes of the Act where the Board is satisfied that they are engaged in associated or related activities under common direction or control. In that respect, section 1(4) modifies traditional common-law notions which are based upon the separation between legal entities and the privity of contract. It is a remedial provision intended to prevent the intentional or incidental frustration or erosion of established bargaining rights consequent upon changes in the structure or form of what is, for labour relations purposes, a single business or activity. To put it another way, whatever separation may exist between two or more entities for corporate, tax or other purposes, the Board is entitled to treat them as being one employer for labour relations purposes if they carry on associated or related activities under common control or direction. The purpose of section 1(4) is to protect the bargaining rights of a trade union and the rights of employees to bargain collectively with their employer through that trade union from being undermined by the form, or an alteration of the form, of a business or activity. In applications under section 1(4), the Board is concerned with the functional relationship between entities. Businesses or activities are "related" or "associated" because they are of the same character, serve the same general market, employ the same mode or the means of production, utilize similar employee skills, or are carried on for the benefit of related principals (see, for example, *Brant Erecting and Hoisting*, [1980] OLRB Rep. July 945 and October 1353). Where the Board is satisfied that two or more entities carry on associated or related activities or businesses under common control or direction, which may but does not necessarily include control over employees, the Board may declare that those entities constitute one employer for purposes of the *Labour Relations Act*. The effect of such a declaration is that the affected entities share the rights and obligations of an employer under the Act and any applicable collective agreement.

7. Section 64 has the same purpose and a similar effect. Like section 1(4), it recognizes that a "business" is a concept which does not lend itself to precise definition. Rather, a business is an economic activity (whether for profit or not) which can be conducted through a variety of legal vehicles or arrangements. It is the activity, not its form, which give rise to employee-employer relationships which are regulated by the Act and to which bargaining rights attach. Consequently, under the *Labour Relations Act*, bargaining rights attach to an activity as an employer rather than to a particular employer name or form of employer, and so long as that activity continues bargaining rights continue to exist. As in section 1(4), common-law or commercial law concepts have limited application to section 64 applications. Indeed it is those very concepts which led to the problems which the two provisions are intended to remedy.

8. The term "business" is not limited to a commercial or profit making activity. Sections 1(4) and 64 apply equally to traditional commercial activity and to municipalities, school boards, hos-

pitals and other non-profit undertakings which have employees. It is the labour relations aspect of a “business” which is the focus of sections 1(4) and 64. In that respect, it is the continuity of the “activity” which is significant. “Business” is not necessarily synonymous with a particular group or kind of employees or the “work” they perform. Concomitantly, bargaining rights do not necessarily attach to particular work or employees. Although a continuity of work may be significant, it is not always sufficient to justify a finding that two or more entities constitute one employer, or that there has been a sale of a business. The focus of the inquiry under both section 1(4) and section 64 is the total economic organization, not just the employees or the work performed (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193; *British American Bank Note Co.*, [1979] OLRB Rep. Feb. 72; *Kitchener-Waterloo Hospital*, [1991] OLRB Rep. Oct. 1130).

The Board, in *Economy Store Fixtures Limited*, [1992] OLRB Rep. May 575, found at paragraph 18 and 19 that section 64 and 1(4) are not mutually exclusive sections of the Act:

18. Section 1(4) and 64 are not necessarily mutually exclusive in their operation or effect. In appropriate circumstances, both may apply. In this case, the associated or related businesses of Economy and Flair were not active at the same time. Further, the applicant has requested that the Board remained seized with respect to remedial consequences other than declaratory relief. Accordingly, and because the effects of a successful section 1(4) application will not always be identical to the effects of a successful section 64 application, we find it necessary to deal with the latter as well.

19. For purposes of section 64 of the Act, a sale of business includes *any* disposition of *any* part of a business. A sale of business for labour relations purposes can be quite different from a sale of business in the judicial commercial sense. Like section 1(4), section 64 is intended to preserve bargaining rights along a business continuum and many of the comments we have already made with respect to the applicability of section 1(4) apply equally to section 64. A business is a dynamic combination of human initiative and physical assets. It is the human quality which gives a sense of life to a business and which separates it from a collection of assets. Bargaining rights attach to a business as an economic force or organization, not merely to employees, equipment or work performed. As the Board observed in *Gallant Painting*, [1991] OLRB Rep. 1051 in that respect:

44. A “business” is the totality of the undertaking. A “business” may include such tangible assets as tools, equipment, machinery, physical buildings together with such less tangible assets as skilled management and operating personnel and intangibles such as goodwill (see *Metropolitan Parking Inc.*, [1979] OLRB Rep. Dec. 1193). A “business” must be distinguished from the work performed or carried out by the business. This is particularly true in circumstances such as the present which involve a business which obtains its work by being the successful bidder on contracts which are regularly sent out for tender (either public tender or invited tender).

36. As the Board has noted in the past, the essence of a “business” in a bid-oriented sector of the construction industry frequently resides in the experience and expertise of its management personnel, rather than, for example, in physical assets such as tools or a specific location (see: *Construction P.H. Grager Inc.*, [1985] OLRB Rep. Feb. 233; *Deluxe Electrical Contractor Ltd.*, [1990] OLRB Rep. Nov. 1135; *Aby Concrete Floor Limited*, [1991] OLRB Rep. May. 579; *Stucor Construction Ltd.*, [1987] OLRB Rep. April 614).

37. We find that Eli Himelfarb, a master electrician, was involved in a succession of companies, for our purposes the Responding Parties, which did electrical contracting in the ICI and the residential sectors of the construction industry. Mr. Himelfarb always had an ownership interest in the various companies that form the group of Responding Parties listed above. In each company, he was responsible for the construction end of the business. The companies relied on his expertise in the construction field to bid and win contracts; as well, they relied on his expertise to direct the workers. Each time he left a company, that company ceased to exist in the form of an electrical contracting firm in the construction industry. In all the companies, he was the only qualified elec-

trician, his partners invariably were business or financial people who were either silent partners or who were responsible for the office and the books. With the exception of E & E Steeles Electric Ltd., each time Mr. Himelfarb was involved with a new company, he would inform the union about the company and the principals in the company.

38. Eli Himelfarb is the quint essential key person. It is his expertise and experience that has allowed the Responding Parties to flourish. None of the Responding Parties could have existed without him. In particular, Town and Country Electric Ltd. was incorporated because Eli had won a specific contract and needed capital to get the job done. We find that pursuant to section 64, there was a sale of a business from Eli's Electric Service to Town and Country Electric and from Town and Country Electric to Town And Country Electric Ltd. In respect of these companies, Eli Himelfarb and Murray Korman testified that they were bound to a collective agreement with the Union.

39. Between 1975 and 1982, Eli Himelfarb was working as a Union electrician on jobs he received out of the hiring hall. During that period of time all the companies he had been involved with as an owner or shareholder were dormant. They were not contracting in the construction industry. The Responding Parties submitted that the passage of time has created a gap such that Board should dismiss the section 1(4) and the section 64 application. The Board in *Ian Somerville Construction Ltd.*, [1988] OLRB Rep. Oct. 1022 was confronted with a similar issue given a 5 1/2 year gap between two businesses that were related and under common control and direction. In that case, the key principal started another business 5 1/2 years after ceasing the first business. The Board in that case dealt with the matter on the basis of whether it should exercise its discretion in respect of the section 1(4) application. The Board stated at paragraph 19:

19. The economic activity of ISCL that gave rise to a collective bargaining relationship with Local 27 is, in effect, now carried on by 671860. The two entities are engaged in related activities under common control and direction. We are unable to discover any labour relations reason in these circumstances for concluding that the bargaining rights of Local 27 should not attach to the "definable commercial activity" simply because that activity is carried on through another legal entity 5 1/2 years after ISCL ceased operating. If Robert Somerville revived ISCL in 1987 to carry on the work now performed by 671860, there would be no question that the bargaining rights of Local 27 would continue. The fact that Robert Somerville elected not to revive ISCL but rather to utilize another corporate vehicle to carry on a related business 5 1/2 years later is not a compelling reason to decline to exercise our discretion in Local 27's favour. After reviewing all of the circumstances, including the 5 1/2 year gap, we find that this is an appropriate case to exercise our discretion in favour of granting Local 27 the relief it seeks.

40. We find that the Board's reasoning in respect of the discretion issue as it relates to section 1(4) to be of value with respect to the application of section 64 to the case at hand. The passage of time does not negate a sale of a business. Companies are often "put on a shelf" to be resurrected at a later date (see: *Construction P.H. Grager Inc.*, (*supra*)). Time on its own should not eliminate business transactions. The seven and one-half years between the time Mr. Himelfarb left Town and Country Electric LTD. and the start up of Town and Country does not in a, "construction industry, labour relations sense" affect the sale of the business and consequently the flow through of bargaining rights. We find that there has been a sale of a business from Town And Country Ltd. to Town and Country and from Town and Country to Steeles Electric.

41. Steeles Electric operated prior to the incorporation of E & E Steeles Electric Ltd. c.o.b as E & E Steeles Electric c.o.b as Steeles Electric. Steeles Electric was the vehicle through which Eli Himelfarb developed his contacts with Bramalea. Eli Himelfarb depended on Ben Swirsky in the same way he depended on Jacob Korman, in that they were both his access to capital. It is true that the commercial relationship between Himelfarb and Korman was different then the commer-

cial relationship between Himelfarb and Swirsky, however this difference does not have any labour relations significance. Eli Himelfarb in both situations was in control of the workforce and the bidding of work. He was the only one with any electrical contracting experience. Without him there would not have been an electrical contracting business.

42. Steeles Electric continued to operate after the incorporation of E & E Steeles Electric Ltd. Eli Himelfarb carried on business in three different names after May 8, 1984, the date of the incorporation of E & E Steeles Electric Ltd. Eli Himelfarb used E & E Steeles Electric Ltd., E & E Steeles, and Steeles Electric. In a labour relations sense, Eli Himelfarb served these “companies” in the exact same way he served all the other Responding Parties. He bid the work, and then managed the work force on a day to day basis. Like the other companies he was not involved in any of the office and clerical decisions. This area of the company was left to Mary-Ellen Himelfarb. Like the other companies, these companies could not have existed without Eli Himelfarb.

43. We find that Steeles Electric, E & E Steeles Electric Ltd., and E & E Steeles Electric are controlled and directed by and for Eli Himelfarb. Mr. Himelfarb is a “key person” within the meaning of that label as developed by the jurisprudence.

44. In determining whether a section 1 (4) declaration should be made in this case, the Responding Parties requested that the Board exercise its discretion and dismiss this application because the union had delayed bringing this application. The Board in *KNK Limited*, [1991] OLRB Rep. February 209, reviewed the history and development of section 1(4) as it relates to the exercising of discretion in respect of delay. The Board at paragraph 57 held that:

In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the “mischief” which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. If that were the test, the purpose of section 1(4) would be undermined, and the related employer could plead, in reply, the very “mischief” upon which the union relies and for which section 1(4) is a remedy. The argument becomes entirely circular. A union’s undue delay in the face of knowledge of the corporate relationship (i.e. what section 1(5) suggests a union will *not* know) may be a factor to be considered in exercising the Board’s discretion, but the focus should be on the actual prejudice suffered by the employer and the extent to which the union’s inaction actually contributed to that prejudice. Where the union’s inaction is so longstanding as to be tantamount to an abandonment of its bargaining rights, the Board may well dismiss the application. However, where the balance of labour relations interests can be achieved by limiting the retrospective effect of a declaration or granting such other relief “as it may deem appropriate”, the Board should consider that option, rather than dismissing the application altogether.

45. In July of 1987, the Union found Mr. Himelfarb performing electrical contracting work with non-union employees in direct contravention of the collective agreement. They decided to discipline Mr. Himelfarb by fining him \$10,000.00 because he allowed a non-union employee to use his Union card. Subsequently Mr. Himelfarb was suspended for non-payment of dues. The Union never proceeded with the grievance. In our view, Mr. Himelfarb concluded that the Union had washed their hands of him. He was of the view that they believed him to be a non-union contractor. Mr. Himelfarb relied upon the union’s inaction, as a consequence of the union failing to grieve, in the face of a contravention of the collective agreement, and started bidding non-union jobs. The Union has always known of Mr. Himelfarb’s connection to Bramalea and they did not, between 1987 and the filing of the instant applications, do anything about stopping Mr. Himelfarb from using non-union employees on the Bramalea job sites, or any other job site for that matter. It

is only when the Union filed its related employer application that Mr. Himelfarb was put on notice that the Union was going to assert its statutory rights in respect of his companies.

46. We find that Steeles Electric, E & E Steeles Electric, and E & E Steeles Electric Ltd., are one employer within the meaning and for the purposes of the *Act*. We find that Steeles Electric, E & E Steeles Electric and E & E Steeles Electric LTD. are bound to the Union provincial collective agreement in the ICI sector of the Construction Industry. However, for the reasons expressed in *KNK Limited, supra*, we would limit the effect of the declaration to those commercial activities or contracts entered into by Steeles Electric, E & E Steeles Electric and E & E Steeles Electric Ltd., after receipt of notice of this section 1(4) application. We would affirm the decision of the Board in *KNK Limited, supra*, which views the curtailing of the retrospective effect of the section as an exception to the general rule of retrospective effect.

47. The panel remains seized of this matter with respect to any further remedial issues.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING APRIL 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

1334-93-R: International Ladies' Garment Workers' Union (Applicant) v. Canadian African Newcomer Aid Centre of Toronto (Respondent)

Unit: "all employees of Canadian African Newcomer Aid Centre of Toronto in the Municipality of Metropolitan Toronto, save and except the Executive Director and persons above the rank of Executive Director" (12 employees in unit)

1541-93-R: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. The McBride Group Inc. (Respondent) v. Operative Plasterers and Cement Masons International Association of the United States and Canada, Local 598, Labourers' International Union of North America, Local 1059 (Intervenors)

Unit: "all journeymen and apprentice bricklayers in the employ of The McBride Group Inc. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Counties of Oxford, Perth, Huron, Middlesex, Bruce, and Elgin, save and except non-working foremen and persons above the rank of non-working foreman (which is a standard bargaining unit description for the applicant)" (5 employees in unit)

1590-93-R: United Steelworkers of America (Applicant) v. 681356 Ontario Limited c.o.b. as Foyer Sarsfield Nursing Home (Respondent)

Unit: "all employees of 681356 Ontario Limited c.o.b. as Foyer Sarsfield Nursing Home in the Village of Sarsfield, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (42 employees in unit)

2503-93-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Walnut Building and Investment Limited (Respondent)

Unit: "all construction labourers in the employ of Walnut Building and Investment Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Walnut Building and Investment Limited in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (8 employees in unit)

2631-93-R: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Rock Construction & Management Ltd. (Respondent)

Unit: "all rodmen in the employ of Rock Construction & Management Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all rodmen in the employ of Rock Construction & Management Ltd. in all sectors of the construction industry in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2941-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. First Canadian Parking Services Inc. c.o.b. as Unit Park (Respondent)

Unit: "all employees of First Canadian Parking Services Inc. c.o.b. as Unit Park in the Regional Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, maintenance, office, clerical and sales staff" (47 employees in unit) (*Having regard to the agreement of the parties*)

3340-93-R: United Steelworkers of America (Applicant) v. Burns International Security Services Limited (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Burns International Security Services Limited in the Regional Municipality of Sudbury, save and except Field Supervisor, persons above the rank of Field Supervisor, and Timekeeper/Secretary" (83 employees in unit) (*Clarity Note*)

3475-93-R: International Brotherhood of Painters and Allied Trades Local 1832 (Applicant) v. Winguard Aluminum Mfg. Ltd. (Respondent)

Unit: "all glaziers and glaziers' apprentices in the employ of Winguard Aluminum Mfg. Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all glaziers and glaziers' apprentices in the employ of Winguard Aluminum Mfg. Ltd. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (10 employees in unit)

3780-93-R: Ontario Nurses' Association (Applicant) v. Glazier Medical Centre (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by Glazier Medical Centre in the City of Oshawa, save and except supervisors and persons above the rank of supervisor" (17 employees in unit)

3796-93-R: United Steelworkers of America (Applicant) v. 625051 Ontario Inc. c.o.b. as LOEB Club Plus Tillsonburg (Respondent)

Unit: "all employees of 625051 Ontario Inc. c.o.b. as LOEB Club Plus Tillsonburg in the City of Tillsonburg, save and except Managers, persons above the rank of Manager and the Assistant Grocery Manager" (94 employees in unit)

3811-93-R: United Steelworkers of America (Applicant) v. Adelco Supply Company Inc. (Respondent)

Unit: "all employees of Adelco Supply Company Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (18 employees in unit)

3899-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Glazier Medical Centre (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Glazier Medical Centre in the City of Oshawa, save and except physicians, registered and graduate nurses employed in a nursing capacity, assistant administrators, supervisors, and persons above the rank of assistant administrator and supervisor" (102 employees in unit)

3938-93-R: Masonry Council of Unions Toronto and Vicinity (Applicant) v. 1061343 Ontario Ltd. (Respondent)

Unit: "all bricklayers, bricklayers' apprentices, stonemasons, stonemasons' apprentices and construction labourers in the employ of 1061343 Ontario Limited in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, com-

mercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

3941-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: "all employees of Empire Maintenance Industries Inc. engaged in cleaning and maintenance at Dufferin Mall, 900 Dufferin Street, in the Municipality of Metropolitan Toronto, save and except supervisory personnel, persons above the rank of supervisory personnel, office and clerical staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

3968-93-R: International Union of Bricklayers and Allied Craftsmen Local 25, Ontario (Applicant) v. General Masonry Company Inc. (Respondent)

Unit: "all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of General Masonry Company Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all bricklayers and bricklayers' apprentices, stonemasons and stonemasons' apprentices in the employ of General Masonry Company Inc. in all sectors of the construction industry in the District of Kenora including the Patricia portion, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

4008-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Empire Maintenance Industries Inc. (Respondent)

Unit: "all employees of Empire Maintenance Industries Inc. engaged in cleaning and maintenance at 181 University Avenue and 150 York Street in the Municipality of Metropolitan Toronto, save and except supervisory personnel, persons above the rank of supervisory personnel, office and clerical staff" (20 employees in unit) (*Having regard to the agreement of the parties*)

4047-93-R: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. Marli Mechanical Ltd. (Respondent)

Unit: "all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Marli Mechanical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all plumbers and plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Marli Mechanical Ltd. in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

4093-93-R: United Steelworkers of America (Applicant) v. Barnes Security Services Limited (Respondent)

Unit: "all employees of Barnes Security Services Limited c.o.b. as Metropol Security Services in the Regional Municipality of Hamilton-Wentworth and the County of Brant, save and except Mobile Patrol Supervisors and Field Supervisors and persons above the rank of Mobile Patrol Supervisor and Field Supervisor, Dispatchers, office, clerical and sales staff and persons in bargaining units for which any trade union held bargaining rights as of February 25, 1994" (94 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4214-93-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. QBD Cooling Systems Inc. (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of QBD Cooling Systems Inc. employed in the City of Brampton, save and except supervisors, persons above the rank of supervisor, technical, sales, office and clerical employees" (55 employees in unit) (*Having regard to the agreement of the parties*)

4219-93-R: Ontario Public Service Employees Union (Applicant) v. Parkdale Community Legal Services Inc. (Respondent)

Unit: “all employees of Parkdale Community Legal Services Inc. in the Municipality of Metropolitan Toronto entitled to practice law in Ontario and employed in a professional

capacity, save and except lawyers who are members of the management team” (4 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4259-93-R: Teamsters Local 847, Laundry and Linen Drivers and Industrial Workers (Applicant) v. 1037109 Ontario Limited c.o.b. Royal Windsor Hotel (Respondent)

Unit: “all employees of 1037109 Ontario Limited c.o.b. Royal Windsor Hotel, save and except supervisors, persons above the rank of supervisor, auditors, office and sales staff, and students employed during the school vacation period” (16 employees in unit) (*Having regard to the agreement of the parties*)

4279-93-R: Canadian Security Union (Applicant) v. Thunder Bay Security & Investigations Inc. (Respondent)

Unit: “all security guards employed by Thunder Bay Security & Investigations Inc. at 300 North Lillie Street (Hogarth-Westmount Hospital) in Thunder Bay, save and except supervisors and persons above the rank of supervisor” (3 employees in unit) (*Having regard to the agreement of the parties*)

4294-93-R: Ontario Public Service Employees Union (Applicant) v. Beaverton and District Ambulance (Respondent)

Unit: “all employees of Beaverton and District Ambulance employed in Ambulance Service Operations, regularly employed for not more than 24 hours per week in the Townships of Brock and Fenelon Falls and the Town of Georgina, save and except supervisors, persons above the rank of supervisor, office staff and students employed during the school vacation period” (5 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4355-93-R: Teamsters Local 847 Laundry and Linen Drivers and Industrial Workers (Applicant) v. Careful Hand Laundry & Dry Cleaning Ltd. (Respondent)

Unit: “all commercial and retail drivers employed by Careful Hand Laundry & Dry Cleaning Ltd., working at or out of 120 Tycos Drive in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and salespersons” (7 employees in unit) (*Having regard to the agreement of the parties*)

4356-93-R: United Steelworkers of America (Applicant) v. National Grocers Co. Ltd. c.o.b. as City Farms, Your Independent Grocer (Respondent)

Unit: “all employees of National Grocers Co. Ltd. c.o.b. as City Farms, Your Independent Grocer at its location situated at 600 Victoria Park Avenue in the Municipality of Metropolitan Toronto, save and except Store Manager, persons above the rank of Store Manager, Department Managers, Bookkeeper and office and clerical staff” (74 employees in unit) (*Having regard to the agreement of the parties*)

4361-93-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW (Applicant) v. Injectech Industries Inc. c.o.b. as Walter Industries (Respondent)

Unit: “all employees of Injectech Industries Inc. c.o.b. as Walter Industries in the City of Barrie save and except area supervisors, persons above the rank of area supervisor, office, clerical and sales staff” (92 employees in unit)

4367-93-R: Canadian Union of Public Employees (Applicant) v. Corporation of the City of Kingston (Respondent)

Unit: “all employees of the Corporation of the City of Kingston regularly employed for not more than 24 hours per week and students employed during the school vacation period at its Aquatic Centre and Artillery

Park in the City of Kingston, save and except Recreation Supervisors, persons above the rank of Recreation Supervisor, Specialist Instructors and persons in bargaining units for which any trade union held bargaining rights as of March 21, 1994" (32 employees in unit) (*Having regard to the agreement of the parties*)

4412-93-R: Canadian Union of Public Employees (Applicant) v. Corporation of the City of Oshawa (Respondent)

Unit: "all Crossing Guards and Rover Crossing Guards regularly employed for not more than 24 hours per week by the Corporation of the City of Oshawa in the City of Oshawa, save and except supervisors and persons above the rank of supervisor" (73 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4414-93-R: IWA-Canada (Applicant) v. Amoco Fabrics and Fibers Ltd. (Respondent)

Unit: "all security guards employed by Amoco Fabrics and Fibers Ltd. in the Town of Hawkesbury, save and except supervisors, persons above the rank of supervisor, office and sales staff, Laboratory Technician Personnel, Industrial Engineering Personnel, persons regularly employed for not more than 24 hours per week and persons in bargaining units for which any trade union held bargaining rights as of March 23, 1994" (4 employees in unit) (*Having regard to the agreement of the parties*)

4435-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 1011069 Ontario Limited c.o.b. as Longlac Valu-Mart (Respondent)

Unit: "all employees of 1011069 Ontario Limited c.o.b. as Longlac Valu-Mart in the Town of Longlac, save and except Assistant Manager, persons above the rank of Assistant Manager and Bookkeeper" (18 employees in unit) (*Having regard to the agreement of the parties*)

4436-93-R: Ontario Public Service Employees Union (Applicant) v. Advocacy Resource Centre for the Handicapped (Respondent)

Unit: "all employees of Advocacy Resource Centre for the Handicapped in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor and lawyers" (7 employees in unit) (*Having regard to the agreement of the parties*)

4442-93-R: Ontario Public School Teachers' Federation (Applicant) v. The Board of Education for the City of Toronto (Respondent)

Unit: "all Itinerant Music Instructors employed by The Board of Education for the City of Toronto in the City of Toronto, save and except those persons in bargaining units for which any trade union held bargaining rights as of March 25, 1994" (47 employees in unit) (*Having regard to the agreement of the parties*)

4443-93-R: United Steelworkers of America (Applicant) v. Greenhills Corporation (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Greenhills Corporation in the County of Middlesex, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, outside lawn keeping staff and golf course staff" (35 employees in unit) (*Having regard to the agreement of the parties*)

4473-93-R: Canadian Union of Public Employees (Applicant) v. Centre for Advancement in Work and Living (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of the Centre for Advancement in Work and Living in the Municipality of Metropolitan Toronto, save and except Managers, persons above the rank of Manager and Administrative Assistant to the Executive Director" (30 employees in unit) (*Having regard to the agreement of the parties*)

4481-93-R: Labourers' International Union of North America Local 1089 (Applicant) v. Markham General Maintenance Ltd. (Respondent)

Unit: "all employees of Markham General Maintenance Ltd. in the City of Sarnia and the Municipality of

Point Edward, save and except non-working forepersons and persons above the rank of non-working foreperson” (7 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

4482-93-R: Labourers’ International Union of North America Local 1089 (Applicant) v. Double M & M Inc. (Respondent)

Unit: “all employees of Double M & M Inc. at 167 Kendall Street, Point Edward, save and except non-working forepersons and persons above the rank of non-working foreperson” (2 employees in unit) (*Having regard to the agreement of the parties*)

4483-93-R: Labourers’ International Union of North America Local 1089 (Applicant) v. Double M & M Inc. (Respondent)

Unit: “all employees of Double M & M Inc. employed at 555 Exmouth Street in the City of Sarnia, save and except non-working forepersons and persons above the rank of non-working foreperson” (2 employees in unit) (*Having regard to the agreement of the parties*)

4484-93-R: Labourers’ International Union of North America Local 1089 (Applicant) v. Sanitary Maintenance Company Limited (Respondent)

Unit: “all employees of Sanitary Maintenance Company Limited in the City of Sarnia, the Municipality of Point Edward and the Municipality of Corunna, save and except forepersons, persons above the rank of foreperson and office, sales and clerical staff” (51 employees in unit)

4497-93-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. 855569 Ontario Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all meat department employees of 855569 Ontario Limited c.o.b. as Bearance’s I.G.A. in the City Of Kingston, save and except Meat Managers, persons above the rank of Meat Manager and persons regularly employed for not more than 24 hours per week” (7 employees in unit) (*Having regard to the agreement of the parties*)

4499-93-R: United Steelworkers of America (Applicant) v. T.L.C. Merchandising Inc. c.o.b. as Canadian Tire (Respondent)

Unit: “all employees of T.L.C. Merchandising Inc. c.o.b. as Canadian Tire in the Town of Ingersoll, save and except Service Manager and Assistant Store Manager and persons above the rank of Service Manager and Assistant Store Manager” (31 employees in unit) (*Having regard to the agreement of the parties*)

4507-93-R: United Food and Commercial Workers International, Local 175 (Applicant) v. Olymel c.o.b. as St. Isidore Meats (Respondent)

Unit: “Tous les employés de St. Isidore Meats Inc. dans la ville de St. Isidore à l’exception des coordinateurs de production, des personnes qui occupent un rang supérieur à celui de coordinateur de production, contrôleurs de qualité, techniciens en robotique et les personnes qui travaillent comme commis, et commis de bureaux.

all employees of St. Isidore Meats Inc. in the Town of St. Isidore, save and except forepersons, persons above the rank of forepersons, quality control staff, Robotic technicians, and office and clerical staff” (121 employees in unit)

4508-93-R: International Union, United Plant Guard Workers of America, Local 1962 (Applicant) v. Burns International Security Services Limited (Respondent)

Unit: “all security guards employed by Burns International Security Services Limited in the Counties of Bruce, Grey, Dufferin, Simcoe, Muskoka, Haliburton, Parry Sound and Nipissing, save and except Site Supervisors, persons above the rank of Site Supervisor, office, clerical and sales staff and students employed during the school vacation period” (76 employees in unit) (*Having regard to the agreement of the parties*)

4531-93-R: Canadian Security Union (Applicant) v. Ensign Security Services Inc. (Respondent)

Unit: “all security guards in the employ of Ensign Security Services Inc. in the Municipality of Metropolitan Toronto, the City of Mississauga, the City of Brampton, the City of Oakville and the City of Burlington, save and except supervisors, persons above the rank of supervisor and persons for which any trade union held bargaining rights as of March 31st, 1994” (63 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0021-94-R: Local Union 636 of the International Brotherhood of Electrical Workers (Applicant) v. Chubb Security Systems, a division of Chubb Security Canada Inc. (Respondent)

Unit: “all technical employees of Chubb Security Systems, a division of Chubb Security Canada Inc. in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, office, clerical, sales staff and installation staff” (35 employees in unit) (*Having regard to the agreement of the parties*)

0023-94-R: Service Employees International Union, Local 204 (Applicant) v. A & B Courier Services (Respondent)

Unit: “all employees of A & B Courier Services in the Regional Municipality of York, including all dispatchers, save and except managers, and persons above the rank of manager, phone answering, office and sales staff” (47 employees in unit) (*Having regard to the agreement of the parties*)

0026-94-R: Labourers’ International Union of North America, Local 183 (Applicant) v. York Condominium Corporation No. 54 (Respondent)

Unit: “all employees of York Condominium Corporation No. 54 engaged in maintenance and groundskeeping at buildings and townhouses - 21, 23, 25, 27, 29, 31, 33 and 35, Four Winds Drive in the Municipality of Metropolitan Toronto, including Resident Superintendents, save and except Property Managers, persons above the rank of Property Manager, office, clerical and sales staff” (4 employees in unit) (*Having regard to the agreement of the parties*)

0027-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. NHB Industries Limited (Respondent)

Unit: “all employees of NHB Industries Limited in the City of Peterborough, save and except supervisors, persons above the rank of supervisor, office and sales staff” (168 employees in unit) (*Having regard to the agreement of the parties*)

0031-94-R: International Brotherhood of Painters and Allied Trades (Applicant) v. Mutual Drywall Ltd. (Respondent)

Unit: “all journeymen and apprentice painters in the employ of Mutual Drywall Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice painters in the employ of Mutual Drywall Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit) (*Clarity Note*)

0045-94-R: Northern Employees Association (Applicant) v. 955140 Ontario Inc. c.o.b. as Pickard Construction 1991 (Respondent)

Unit: “all employees of 955140 Ontario Inc. c.o.b. as Pickard Construction 1991 in the Province of Ontario, save and except non-working forepersons, persons above the rank of non-working foreperson, office, clerical staff and persons for whom any trade union held bargaining rights as of April 7, 1994” (7 employees in unit) (*Having regard to the agreement of the parties*)

0071-94-R: Practical Nurses Federation of Ontario (Applicant) v. 678114 Ontario Inc. c.o.b. as Vistamere Retirement Residence (Respondent)

Unit: “all employees of 678114 Ontario Inc. c.o.b. as Vistamere Retirement Residence employed in a nursing capacity as registered and graduate practical nurses in the City of Oakville, save and except supervisors and persons above the rank of supervisor” (12 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0085-94-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Citipark Inc. (Respondent)

Unit: “all employees of Citipark Inc. in the City of Ottawa regularly employed for not more than 24 hours per week and students employed during the school vacation period, save and except supervisors, persons above the rank of supervisor, auditors, office and clerical staff and persons in bargaining units for which any trade union held bargaining rights as of April 8th, 1994” (21 employees in unit) (*Having regard to the agreement of the parties*)

0093-94-R: International Ladies Garment Workers Union (Applicant) v. Tibbett & Britten Group Canada Inc. (Respondent)

Unit: “all employees of Tibbett & Britten Group Canada Inc. at 1250 Ormont Drive in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff” (18 employees in unit) (*Having regard to the agreement of the parties*)

0132-94-R: Canadian Security Union (Applicant) v. Cambrian Alliance Protection Services Inc. (Respondent)

Unit: “all security officers employed by Cambrian Alliance Protection Services Inc. in the Regional Municipality of Sudbury, save and except supervisors and persons above the rank of supervisor” (8 employees in unit) (*Having regard to the agreement of the parties*)

0143-94-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Daysi Industries Inc. (Respondent)

Unit: “all employees of Daysi Industries Inc. in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, technical and sales staff” (24 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0144-94-R: Canadian Union of Operating Engineers and General Workers (Applicant) v. Rehabilitation Centre for the Disabled o/a Ontario March of Dimes (Respondent)

Unit: “all employees of Rehabilitation Centre for the Disabled o/a Ontario March of Dimes employed at Central Place, 185 Jackson Street East in the City of Hamilton, save and except supervisors, persons above the rank of supervisor, office and clerical employees” (8 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

4121-93-R: Teamsters Local Union No. 419 (Applicant) v. Kenneth J. Gibson Enterprises Limited (Respondent) v. Group of Employees (Objectors)

Unit: “all employees of Kenneth J. Gibson Enterprises Limited c.o.b. as Canadian Tire Auto Centre in the Municipality of Metropolitan Toronto, save and except Department Managers and persons above the rank of Department Manager” (82 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	88
Number of persons who cast ballots	80
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	80
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant	36

4148-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-

Canada) (Applicant) v. St. Catharines Hydro Electric Commission (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all employees of the St. Catharines Hydro Electric Commission in the City of St. Catharines, save and except General Manager's Secretary, Human Resources Assistant, students employed during the summer vacation period and students employed during their work term, foremen and those above the rank of foreman and secretary to the Commission" (86 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	89
Number of persons who cast ballots	87
Number of ballots, excluding segregated ballots, cast by persons whose names appear on voters' list	87
Number of ballots marked in favour of applicant	46
Number of ballots marked in favour of intervener	41

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3452-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Richmond Die Casting Ltd. (Respondent)

Unit: "all employees of Richmond Die Casting Ltd. in the Township of Cornwall, save and except supervisors, persons above the rank of supervisor, office, clerical, sales and technical staff" (193 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	208
Number of persons who cast ballots	197
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	197
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	101
Number of ballots marked against applicant	95

3547-93-R: Ontario English Catholic Teachers' Association (Applicant) v. Stormont, Dundas & Glengarry County Roman Catholic Separate School Board (Respondent)

Unit: "all occasional teachers employed by the Stormont, Dundas & Glengarry County Roman Catholic Separate School Board in the Counties of Stormont, Dundas, and Glengarry, save and except persons who, when they are employed as substitutes for other teachers, are teachers as defined in the School Boards and Teachers Collective Negotiations Act, or who are employed by the Stormont, Dundas & Glengarry County Roman Catholic Separate School Board in its secondary schools where French is the language of instruction (Part XIII schools under the Education Act), or for which any trade union held bargaining rights as of January 17, 1994" (48 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	61
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	2

3629-93-R: Canadian Food and Allied Workers' Union (Applicant) v. Caterair Chateau Canada Limited (Respondent) v. Hotel Employee's Restaurant Employee's Union Local 75 (Intervener)

Unit: "all employees of Caterair Chateau Canada Limited at its Chateau Flight Kitchens at the Lester B. Pearson International Airport in the Regional Municipality of Peel, save and except Managers, Assistant Managers, Department Heads, Supervisors and Accounting, Administration and clerical staff" (437 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	534
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Number of persons who cast ballots	360
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	350
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	256
Number of ballots marked in favour of intervener	96
Number of ballots segregated and not counted	2

4106-93-R: Canadian Union of Public Employees, Local 79 (Applicant) v. The Board of Governors of the Riverdale Hospital (Respondent)

Unit: "all employees of The Board of Governors of the Riverdale Hospital in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, and persons in bargaining units for which any trade union held bargaining rights as of February 28, 1994" (183 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	215
Number of persons who cast ballots	33
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	33
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	32
Number of ballots marked against applicant	0

Applications for Certification Dismissed Without Vote

3160-93-R: The Ontario Pipe Trades Council of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada and The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada Local Union 508 (Applicants) v. Gerger Mechanical Ltd. (Respondent)

4493-93-R: Saverio Rizzo & Felice Carlucci (Applicant) v. U.A. Local Union 46 (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

3952-93-R: Ontario Public Service Employees Union (Applicant) v. Orillia Soldiers' Memorial Hospital (Respondent)

Unit #1: "all paramedical employees of Orillia Soldiers' Memorial Hospital in the City of Orillia, save and except managers, assistant directors, persons above the rank of manager or assistant director, students in training and persons for whom any trade union held bargaining rights as of February 17, 1994" (104 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

Number of names of persons on revised voters' list	101
Number of persons who cast ballots	94
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	94
Number of ballots marked in favour of applicant	43
Number of ballots marked against applicant	51

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

3402-93-R: United Food & Commercial Workers International Union, AFL, CIO, CLC (Applicant) v. Highland Packers Limited (Respondent)

Unit: "all employees of Highland Packers Limited in the City of Stoney Creek in the Regional Municipality of

Hamilton-Wentworth, save and except forepersons and persons above the rank of forepersons, sales, office and clerical employees and persons regularly employed for not more than twenty-four hours per week" (40 employees in unit)

Number of names of persons on revised voters' list	29
Number of persons who cast ballots	30
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	29
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	14

Applications for Certification Withdrawn

3000-93-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Orlando Construction Corporation c.o.b. as Select Management (Respondent)

3064-93-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

3700-93-R: Service Employees Union, Local 210 (Applicant) v. Chateau Park Nursing Home (Respondent)

4314-93-R: Labourers' International Union of North America, Local 506 (Applicant) v. G.D. Hanna Incorporated (Respondent)

4326-93-R: Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Applicant) v. C.O.T.A. (Community Occupational Therapy Associates) (Respondent)

4331-93-R: Labourers' International Union of North America Local 837 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

4349-93-R: Northern Employees Association (Applicant) v. Pickard Construction 1991 (Respondent)

4358-93-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Champlain Energies Ltd. (Respondent)

4418-93-R: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Wilson Fine Cabinetry Ltd./Interflex Laboratory Furniture (Ont.) Ltd. (Respondent)

4462-93-R: Service Employees Union Local 268 affiliated with the S.E.I.U., A.F. of L., C.I.O. and C.L.C. (Applicant) v. The Corporation of the Township of Terrace Bay (Respondent)

4464-93-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Jelco Packaging Corp. (Respondent)

4475-93-R: KS Centoco Employees Union (Applicant) v. K.S. Centoco (Respondent)

4479-93-R: Ontario Public Service Employees Union (Applicant) v. Go Transit (Respondent) v. Amalgamated Transit Union Local 1587 (Intervener)

4491-93-R: Independent Paperworkers of Canada (Applicant) v. Janwin Packaging Inc. (Respondent)

4515-93-R: Service Employees Union, Local 210 (Applicant) v. The Salvation Army Grace Hospital (Respondent) v. International Brotherhood of Electrical Workers, Local 1230, Ontario Public Service Employees' Union (Interveners)

4533-93-R: International Brotherhood of Electrical Workers Local Union 115 (Applicant) v. 548534 Ontario Ltd. c.o.b. as Town & Country Electric (Respondent)

0020-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

0116-94-R; 0117-94-R; 0118-94-R: Canadian Security Union (Applicant) v. 547573 Ontario Limited Operating as Norpro Company (Respondent)

0121-94-R: Labourers International Union of North America, Local 506 (Applicant) v. Tri-Krete Limited (Respondent)

0240-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. 885028 Ontario Inc. O/A Accu-Bore Construction (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

2820-93-R: International Brotherhood of Electrical Workers, Local 636 (Applicant) v. The Hydro-Electric Commission of the City of Ottawa (Respondent) (*Granted*)

4261-93-R: United Steelworkers of America (Applicant) v. Barnes Security Services Limited (Respondent) (*Granted*)

4460-93-R: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent) (*Granted*)

0030-94-R: ReliaCARE Inc. c.o.b. Riverside Health Care Centre (Applicant) v. Canadian Union of Public Employees and its Local 2028 (Respondent) (*Withdrawn*)

0086-94-R: Hospitality & Service Trades Union, Local 261 (Applicant) v. Citipark Inc. (Respondent) (*Granted*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

0888-90-R: Service Employees' International Union, Local 532 (Applicant) v. Saint Elizabeth Home Society, Ontario Ministry of Health, Heritage Green Senior Centre (Respondents) (*Granted*)

2192-90-R: United Brotherhood of Carpenters and Joiners of America Local 1256 (Applicant) v. Maaten Construction Limited; 865541 Ontario Inc. (Respondents) (*Dismissed*)

2527-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.- Canada) and its Local 40 (formerly the Canadian Textile and Chemical Union) (Applicant) v. The Peel County Restaurant, The Bristol Group, Francon Consulting Limited, Promenade Tours Inc. and Waldo Stubbs Tap & Grill Restaurants Inc. (Respondents) (*Withdrawn*)

1257-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Solell Homes Limited and Solell Homes IV Limited (Respondents) (*Granted*)

1514-93-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Roy and Huebert Limited, National Painting & Decorating Corporation (Respondents) (*Withdrawn*)

3057-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Brule Construction Limited (Respondent) (*Withdrawn*)

3787-93-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Ap-

plicant) v. Symetrical Drywall Interiors Ltd. and Tacapa Construction Div. of Tacapa Land Company Ltd. (Respondents) (*Withdrawn*)

4142-93-R: Sheet Metal Workers' International Association and Ontario Sheet Metal workers' Conference for Local 47 (Applicant) v. Revetements A.D.A. - Enr. and Structures Montreuil (Respondents) (*Granted*)

4381-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the IUBAC (Applicant) v. Zorgo Construction Ltd. and Stefero Masonry (Respondents) (*Withdrawn*)

4387-93-R: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Thornhill Glass & Mirror Inc. and 975866 Ontario Limited c.o.b. as Tagg Industries (Respondents) (*Granted*)

4428-93-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mavi Drywall Systems Ltd. and Parvi Drywall Systems Ltd. (Respondents) (*Granted*)

SALE OF A BUSINESS

0888-90-R: Service Employees' International Union, Local 532 (Applicant) v. Saint Elizabeth Home Society, Ontario Ministry of Health, Heritage Green Senior Centre (Respondents) (*Granted*)

2527-92-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.- Canada) and its Local 40 (formerly the Canadian Textile and Chemical Union) (Applicant) v. The Peel County Restaurant, The Bristol Group, Francon Consulting Limited, Promenade Tours Inc. and Waldo Stubbs Tap & Grill Restaurants Inc. (Respondents) (*Withdrawn*)

1257-93-R: Labourers' International Union of North America, Local 183 (Applicant) v. Solell Homes Limited and Solell Homes IV Limited (Respondents) (*Granted*)

1514-93-R: International Brotherhood of Painters and Allied Trades, Local 1494 (Applicant) v. Roy and Huebert Limited, National Painting & Decorating Corporation (Respondents) (*Withdrawn*)

3057-93-R: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Brule Construction Limited (Respondent) (*Withdrawn*)

3787-93-R: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Symetrical Drywall Interiors Ltd. and Tacapa Construction Div. of Tacapa Land Company Ltd. (Respondents) (*Withdrawn*)

4142-93-R: Sheet Metal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Applicants) v. Revetements A.D.A. - Enr. and Structures Montreuil (Respondents) (*Granted*)

4381-93-R: International Union of Bricklayers and Allied Craftsmen Local #2, Ontario and the Ontario Provincial Conference of the IUBAC (Applicant) v. Zorgo Construction Ltd. and Stefero Masonry (Respondents) (*Withdrawn*)

4387-93-R: International Brotherhood of Painters and Allied Trades, Local 1819, Glaziers (Applicant) v. Thornhill Glass & Mirror Inc. and 975866 Ontario Limited c.o.b. as Tagg Industries (Respondents) (*Granted*)

4428-93-R: International Brotherhood of Painters and Allied Trades, Local Union 1891 (Applicant) v. Mavi Drywall Systems Ltd. and Parvi Drywall Systems Ltd. (Respondents) (*Granted*)

CROWN TRANSFER ACT

0887-90-R: Service Employees' International Union, Local 532 (Applicant) v. Saint Elizabeth Home Society, Ontario Ministry of Health, Heritage Green Senior Centre (Respondents) (*Granted*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0384-92-R: Frank Somerville Jr. (Applicant) v. Ontario Provincial Conference of the International Union of Bricklayers and Allied Craftsmen and International Union of Bricklayers and Allied Craftsmen, Local 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16, 17, 20, 23, 25, 28, 29, 30, 31, 33 and 36 (Respondent) v. Magton Masonry Inc. (Intervener)

Unit: “all bricklayers and bricklayers’ apprentices, stonemasons and stonemasons’ apprentices in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit) (*Dismissed*)

3697-93-R: Sheri Gruyaert (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. Wendy’s Restaurants of Canada Inc. (Intervener)

Unit: “all employees of Wendy’s Restaurants of Canada Inc., Store #365 at 1411 Ouellette Avenue, Windsor, save and except Assistant Manager, those above the rank of Assistant Manager, office and clerical staff, and employees regularly employed for not more than 24 hours per week and all employees of Wendy’s Restaurants of Canada Inc., Store #365 at 1411 Ouellette Avenue, Windsor, employed for not more than 24 hours per week, save and except Assistant Manager, those above the rank of Assistant Manager and office and clerical staff” (28 employees in unit) (*Granted*)

Number of names of persons on revised voters’ list	29
Number of persons who cast ballots	26
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	26
Number of ballots marked in favour of respondent	7
Number of ballots marked against respondent	19

3721-93-R: Mechanics in Garage, Maple Lodge Farms (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. Maple Lodge Farms (Intervener)

Unit: “all employees of Maple Lodge Farms Ltd. employed in its garage at R.R. #2, Norval, save and except General Garage Foreman, persons above the rank of General Garage Foreman, Driver Trainer, office and clerical staff” (30 employees in unit) (*Dismissed*)

4083-93-R: The Employees of Unisource Canada Inc. (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW Canada) and its Local 124 (Respondent) v. Unisource Canada Inc. (Intervener)

Unit: “all employees of Unisource Canada Inc. Fine Papers at its warehouse at 50 East Wilmont Street, Richmond Hill, save and except supervisors, persons above the rank of supervisor, clerical staff, students employed during the school vacation period and probationary employees with less than forty (40) worked days” (46 employees in unit) (*Dismissed*)

4324-93-R: Mr. Michael D. Wilvert (Applicant) v. Laborers’ International Union of North America Local 183, (Respondent) v. Sabra Property Management (Intervener) (*Withdrawn*)

4389-93-R: Isilda Azevedo (Applicant) v. Hospitality and Service Trades Union Local 261 (Respondent) v. Lorne Murphy Foods Limited (Intervener) (*Withdrawn*)

4394-93-R: Employees of Laidlaw Waste Systems Ltd. (Sudbury Division) (Applicant) v. Labourers’ International Union of North America, Oil & Gas Technicians, Service, Domestic & General Workers Union Local 1267 (Respondent) v. Laidlaw Waste Systems Ltd. (Sudbury Division) (Intervener) (*Granted*)

4429-93-R: John Duczynski (Applicant) v. Teamsters Union Local 990 (Respondent) v. CAA Thunder Bay (Intervener) (*Granted*)

4439-93-R: Arnold Funk and Maurice Beaudoin on behalf of a group of employees (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW Canada), and its Local 199 (Respondent) v. Venest Industries, a division of Cosma International Inc. (Intervener) (*Dismissed*)

4474-93-R: The Employees of St. Leonard's Home Trenton Inc. (Applicant) v. Service Employees Union Local 183 (Respondent) v. St. Leonard's Home Trenton Inc. (Intervener) (*Granted*)

4522-93-R: Employees of Rainbow Foods (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) v. Rainbow Foods (Intervener) (*Granted*)

0022-94-R: Richard Kirton (Applicant) v. Communications, Energy and Paper Workers Union of Canada Local 599 (Respondent) v. Anco Chemicals Inc. (Intervener) (*Granted*)

0164-94-R: John Murphy, Employee of Wayne Pitman Ford (Applicant) v. Retail Wholesale Canada (Division of U.S.W.A.) (Respondent) v. Wayne Pitman Ford (Intervener) (*Granted*)

REFERRAL FROM MINISTER (SECTION 109)

3970-93-M: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Dynamo Masonry Contracting Ltd. (Respondent) (*Granted*)

APPLICATION - UNLAWFUL AGREEMENT (S.137(3))

4085-93-U: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association, Local 30 (Applicant) v. Sheet Metal Workers' International Association, Local 285, Dearie Martino Contractors (Respondents) (*Withdrawn*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

4471-93-U: Ontario Public Service Employees Union (Applicant) v. Modern Building Cleaning Inc., The Crown in Right of Ontario (Ministry of Culture, Tourism and Recreation) (at the Ontario Science Centre) and the individuals listed at Schedule "A" (Respondents) (*Granted*)

0202-94-U: Canadian Union of Public Employees and its Local 3190 (Applicant) v. Larry Llewellyn and Marriott Corporation of Canada Limited (Respondent) (*Granted*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

1576-92-U: Ontario Public Service Employees Union (Applicant) v. Halton Adolescent Support Services (Respondent) (*Withdrawn*)

2109-92-U: Ontario Public Service Employees Union (Applicant) v. Children's Aid Society (Prescott-Russell) (Respondent) (*Withdrawn*)

3095-92-U: Ontario Secondary School Teachers' Federation (Applicant) v. The Essex County Board of Education (Respondent) (*Withdrawn*)

0148-93-U: Richard Moore (Applicant) v. The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Refrigeration Workers of Ontario) and Joe Carricato (Respondent) (*Dismissed*)

0925-93-U: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc., National Elevator & Escalator Assoc. (Respondents) (*Granted*)

1376-93-U: IWA - Canada (Applicant) v. 795651 Ontario Inc. o/a Le Nord and Raymond Alary (Respondent) (*Withdrawn*)

1641-93-U: International Union of Bricklayers and Allied Craftsmen, Local 5 (Applicant) v. The McBride Group Inc. (Respondent) (*Withdrawn*)

2113-93-U: Marilynn Monnier (Applicant) v. Canadian Union of Public Employees, Local 839 (Respondent) v. Chedoke-McMaster Hospitals (Intervener) (*Withdrawn*)

2375-93-U: The Ontario Secondary School Teachers' Federation (Applicant) v. Essex County Board of Education (Respondent) (*Withdrawn*)

2410-93-U: Leonard Wells, Chairperson, Local 1986; Eric MacKinnon, Local 1986; President et al (Applicant) v. International Union, United Plant Guard Workers of America, (Respondent) v. General Motors of Canada Limited (Intervener) (*Withdrawn*)

2509-93-U; 0025-94-R: Labourers' International Union of North America, Local 527 (Applicant) v. Crane Canada Inc. (Respondent) (*Withdrawn*)

2528-93-U: Anthony Freeman (Applicant) v. Amalgamated Transit Union Local 113 (Respondent) v. Toronto Transit Commission (Intervener) (*Withdrawn*)

2640-93-U: Southern Ontario Newspaper Guild (Applicant) v. Metroland Printing, Publishing and Distributing Ltd. and John Devine (Respondents) (*Withdrawn*)

2739-93-U: James Johnston (Applicant) v. Retail, Wholesale & Department Store Union Local 414 (Respondent) v. The Great Atlantic & Pacific Company of Canada Limited (Intervener) (*Withdrawn*)

2772-93-U: Frank Vastag (Applicant) v. International Association of Machinists and Aerospace Workers (Respondent) v. Fleet Industries (Intervener) (*Dismissed*)

2980-93-U: Marinko Mesic (Applicant) v. Local 795 - Energy & Chemical Workers Union (Respondent) v. Centra Gas Ontario Inc. (Intervener) (*Dismissed*)

3029-93-U: United Steelworkers of America and Brad Ingold (Applicant) v. 895657 South Mitchell Holding Ltd. c.o.b. as Loeb Club Plus (Respondent) (*Withdrawn*)

3238-93-U: Corazon L. Gazman, Eleanor Sucuangco and Beatrice Sarmenta (Applicant) v. Ontario Public Service Employees Union, Local 575 (Respondent) v. Scarborough General Hospital (Intervener) (*Withdrawn*)

3246-93-U: Practical Nurses Federation of Ontario (Applicant) v. The Mississauga Hospital (Respondent) (*Withdrawn*)

3426-93-U: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. D. Dixie Drywall Ltd. (Respondent) (*Granted*)

3580-93-U: United Steelworkers of America (Applicant) v. Gallup Canada, Inc. (Respondent) (*Withdrawn*)

3699-93-U: Maureen M. Withers (Applicant) v. Canadian Union of Public Employees Local 131 and its members (Respondent) (*Withdrawn*)

3753-93-U: Graphic Communications Union, Local 41M (Applicant) v. Standard Freeholder, a division of Thomson Newspapers Company Limited (Respondent) (*Withdrawn*)

3822-93-U; 3882-93-U: Eugene Kalwa (Applicant) v. Ontario Hydro (Respondent); Eugene Kalwa (Applicant) v. The Society of Ontario Hydro Professional and Administrative Employees (Respondent) (*Dismissed*)

3891-93-U: Utility Workers of Canada, Local 1 (Applicant) v. Public Utilities Commission of the City of Scarborough (Respondent) (*Withdrawn*)

3897-93-U: Michael Hamilton (Applicant) v. Executive Officers of Local 79; Canadian Union of Public Employees, Local 79 (Respondent) (*Withdrawn*)

3937-93-U: IWA - Canada, Local 1-1000, (Applicant) v. Heritage Lodge, Guy Desjardins, Donna Desjardins (Respondents) (*Withdrawn*)

3991-93-U: United Steelworkers of America (Applicant) v. Steelwood Doors Co. (Respondent) (*Withdrawn*)

4039-93-U; 4040-93-U; 4041-93-U: Rose Marie Wootton (Applicant) v. Canadian Union of Public Employees, Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener); Cindy L. Felker (Applicant) v. Canadian Union of Public Employees, Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener); Helen Brenton (Applicant) v. Canadian Union of Public Employees, Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener) (*Withdrawn*)

4067-93-U: Steve Komar (Applicant) v. Robert Griffith Bricklayers, Stonemasons Union (Respondent) (*Withdrawn*)

4082-93-U: Pat Whitfield (Applicant) v. Canadian Union of Public Employees Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener) (*Withdrawn*)

4084-93-U: Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 30 (Applicant) v. Sheet Metal Workers' International Association, Local 285, Dearie Martino Contractors (Respondents) (*Withdrawn*)

4090-93-U: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Rock Construction & Management Ltd., George Kalwaney (Respondent) (*Withdrawn*)

4115-93-U; 4123-93-U: Brandy Wintemute (Applicant) v. Canadian Union of Public Employees, Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener); Carol Simpson (Applicant) v. Canadian Union of Public Employees, Local 794 (Respondent) v. Hamilton Civic Hospitals (Intervener) (*Withdrawn*)

4194-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (C.A.W.-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) (*Withdrawn*)

4202-93-U: Duncan Potter (Applicant) v. International Brotherhood of Electrical Workers Local Union 353 (Respondent) (*Withdrawn*)

4203-93-U: Ontario Public Service Employees Union (Applicant) v. The Crown in Right of Ontario (Ministry of Solicitor General and Correctional Services) (Respondent) (*Withdrawn*)

4206-93-U: International Union of Operating Engineers, Local 793 (Applicant) v. Pine by Munro Inc. (Respondent) (*Withdrawn*)

4212-93-U: International Union of Bricklayers and Allied Craftsmen, Local 25, Ontario (Applicant) v. General Masonry Company Inc. (Respondent) (*Granted*)

4213-93-U: Canadian Union of Operating Engineers and General Workers (Applicant) v. QBD Cooling Systems Inc. (Respondent) (*Withdrawn*)

4218-93-U: Canadian Union of Public Employees and its Local 3190 (Applicant) v. Larry Llewellyn and Marriott Management Services - Bell Northern Research (Respondent) (*Withdrawn*)

4222-93-U: The Ontario Public Service Employees Union (Applicant) v. The Ministry of Natural Resources (Respondent) (*Withdrawn*)

4248-93-U: Rein Kartna, B.A., M.A., Probation and Parole Officer OPSEU Union Steward - Local 551 (Applicant) v. The Ontario Ministry of the Solicitor General and Correctional Services (Respondent) (*Withdrawn*)

4262-93-U: United Steelworkers of America (Applicant) v. Barnes Security Services Ltd. c.o.b. Metropol Security Ltd. (Respondent) (*Withdrawn*)

4264-93-U: Motoi Nishikawa (Applicant) v. Labatt's Ontario Breweries Metro Toronto Brewery (Respondent) v. Brewery, General And Professional Workers Union (Intervener) (*Withdrawn*)

4268-93-U: International Brotherhood of Electrical Workers (Applicant) v. Groff & Associates Ltd. (Respondent) (*Withdrawn*)

4280-93-U: Hotel Employees, Restaurant Employees Union, Local 75 (Applicant) v. Talisman Mountain Resort Ltd. (Respondent) (*Withdrawn*)

4283-93-U: Tajammul S. Khan (Applicant) v. Employees' Association Computing Devices Canada and Computing Devices Canada (Respondents) (*Withdrawn*)

4284-93-U: Ontario Public Service Employees Union (Applicant) v. The Donwood Institute (Respondent) (*Withdrawn*)

4289-93-U: Lois Benn (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) (*Withdrawn*)

4310-93-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services (at Queen's University) (Respondent) (*Withdrawn*)

4329-93-U: Allan Smith (Applicant) v. Amalgamated Clothing & Textile Workers Union, Local 1070-T (Respondent) (*Withdrawn*)

4343-93-U: Steve Andrzejewski (Applicant) v. Oshawa Foods (Respondent) v. Teamsters Local Union No. 419 (Intervener) (*Dismissed*)

4345-93-U: Canadian Union of Public Employees Local 2936-05 (Applicant) v. Whitby All Saints Residence Corp. operating as Colborne Residential Services (Respondent) (*Withdrawn*)

4348-93-U: Greg Walker (Applicant) v. Teamsters Local - 419 (Respondent) (*Withdrawn*)

4357-93-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services (at Queen's University) (Respondent) (*Withdrawn*)

4360-93-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America-UAW (Applicant) v. Injectech Industries Inc. c.o.b. as Walter Industries (Respondent) (*Withdrawn*)

4362-93-U: International Brotherhood of Electrical Workers (Applicant) v. Con-Syst-Int Group Inc. (Respondent) (*Withdrawn*)

4379-93-U: Mike Seaborn (Applicant) v. Creative Pultrusions North (Respondent) v. CAW-Canada and its Local 527 (Intervener) (*Withdrawn*)

4384-93-U: Ontario Public Service Employees Union (Applicant) v. Cybermedix Health Services (Respondent) (*Withdrawn*)

4420-93-U: Wyne Floren (Applicant) v. Ontario Hydro and The Teamsters Local Union No. 230 (Respondents) (*Withdrawn*)

4421-93-U: Helder Costa (Applicant) v. Cledwyn Leong (Respondent) (*Withdrawn*)

4434-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Master Tube Manufacturing (1993) Ltd. (Respondent) (*Withdrawn*)

4444-93-U: United Steelworkers of America (Applicant) v. Intertec Security & Investigation Ltd. (Respondent) (*Withdrawn*)

4457-93-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 124 (Applicant) v. Unisource Canada Inc. (Respondent) (*Withdrawn*)

4490-93-U: Independent Paperworkers of America (Applicant) v. Janwin Packaging Inc. (Respondent) (*Withdrawn*)

4510-93-U: Practical Nurses Federation of Ontario (Applicant) v. The Mississauga Hospital (Respondent) (*Withdrawn*)

4521-93-U: Franca Giannotta (Applicant) v. Ontario English Catholic Teachers' Association (Respondent) (*Dismissed*)

4528-93-U: John Nave (Applicant) v. Cametoid Limited (Respondent) (*Withdrawn*)

4529-93-U: John Nave (Applicant) v. The International Association of Machinists & Aerospace Workers (Respondent) v. Cametoid Limited (Intervener) (*Withdrawn*)

0044-94-U: Service Employees International Union, Local 204 (Applicant) v. A & B Courier Services (Respondent) (*Granted*)

0229-94-U: Textile Processors, Service Trades, Health Care Professional and Technical Employees International Union, Local 351 (Applicant) v. Work Wear Corporation of Canada Ltd. (Respondent) (*Withdrawn*)

APPLICATION FOR INTERIM ORDER

4196-93-M: Ontario Public Service Employees Union (Applicant) v. The Crown In Right of Ontario (as represented by the Ontario Ministry of Agriculture and Food) and Ontario Swine Improvement Ontario Incorporated and Beef Improvement Ontario Incorporated (Respondents) v. Group of Employees (Objectors) (*Granted*)

4489-93-M: Independent Paperworkers of Canada (Applicant) v. Janwin Packaging Inc. (Respondent) (*Withdrawn*)

4504-93-M: IWA Canada, Local 2693 (Applicant) v. Avenor Inc. (Respondent) (*Dismissed*)

4509-93-M: The Practical Nurses Federation of Ontario (Applicant) v. The Mississauga Hospital (Respondent) (*Granted*)

0043-94-M: Service Employees International Union, Local 204 (Applicant) v. A & B Courier Services (Respondent) (*Granted*)

0200-94-M: Madelene Alagano, Catalina Alvarez, Elizabeth Araujo, Eileen Buckley, Suzanna Cabral and Susan Chislett (Applicants) v. Miniworld Management, operating as North York Infant Nursery and Pre-school (Respondent) (*Granted*)

0266-94-M: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 1285 (Applicant) v. Hudson Bay Diecasting Limited (Respondent) (*Granted*)

APPLICATIONS FOR CONSENT TO PROSECUTE

4091-93-U: International Association of Bridge, Structural and Ornamental Iron Workers, Local 759 (Applicant) v. Rock Construction & Management Ltd. George Kalwaney (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

0008-94-M: Ridgewood Industries (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

0137-94-M: Essex Linen Supply (Windsor) (Employer) v. Textile Processors, Service Trades, Health Care, Professional and Technical Employees International Union, Local 351 (Trade Union) (*Granted*)

JURISDICTIONAL DISPUTES

2608-92-JD: Service Employees Union, Local 210 (Applicant) v. The Salvation Army Grace Hospital (Respondent) (*Terminated*)

4020-93-JD: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association, Local 269 (Applicant) v. Amherst Roofing and Sheetmetal Ltd., United Brotherhood of Carpenters' & Joiners of America, Local 93 (Respondents) (*Granted*)

4224-93-JD: Board of Governors of Exhibition Place (Applicant) v. International Alliance Theatrical Stage Employees, Local 58 (I.A.T.S.E.), Labourers' International Union of North America, Local 506 (L.I.U.-N.A), Klanside Inc. and Elite Show Services (Respondents) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

3979-93-M: J.J. Elliott Mechanical Ltd. (Applicant) v. Richard Jackson and Ontario Sheet Metal Workers' & Roofers' Conference, Sheet Metal Workers' International Association, Local 537 (Respondents) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

2696-92-OH: Simon Torr (Applicant) v. Lewis Ambulance Services Ltd. (Respondent) (*Terminated*)

3716-93-OH: Peter Bezel (Applicant) v. Spruce Falls Inc. (Respondent) (*Granted*)

4253-93-OH: Marilyn McLoud (Applicant) v. Heaton Custom Goalie Equipment (Respondent) (*Withdrawn*)

4426-93-OH: Joe Maiato (Applicant) v. M-Perial Display Inc., Steve Novick and Glen Inch (Respondent) (*Granted*)

4438-93-OH: Calvin Jesso and Edward Felix (Applicants) v. New York Auto Wreckers Limited (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2191-90-G: United Brotherhood of Carpenters and Joiners of America Local 1256 (Applicant) v. Maaten Construction Limited; 865541 Ontario Inc. (Respondents) (*Dismissed*)

1155-92-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. E.S. Fox Limited (Respondent) v. Ontario

Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 269 (Intervener) (*Withdrawn*)

2080-92-G: United Brotherhood of Carpenters and Joiners of America - Local 494 (Applicant) v. Delsan Demolition Ltd. (Respondent) v. Labourers' International Union of North America, Ontario Provincial District Council (Intervener) (*Withdrawn*)

0924-93-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada, Inc., National Elevator & Escalator Assoc. (Respondents) (*Granted*)

1258-93-G: Labourers' International Union of North America, Local 183 (Applicant) v. Solell Homes Limited (Respondent) (*Granted*)

2134-93-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Les Constructions Brule Limitee - Brule Construction Ltd. (Respondent) (*Withdrawn*)

2455-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local Union 663 (Applicant) v. Sarnia Wolverine Manufacturing Ltd. (Respondent) (*Granted*)

3130-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. D. Dixie Drywall and Country Drywall Inc. (Respondents) (*Granted*)

3177-93-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 700 (Applicant) v. Thomas Steel, 971036 Ontario Ltd. (Respondent) (*Granted*)

3278-93-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ellis Don Construction (Respondent) (*Granted*)

3427-93-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. D. Dixie Drywall Ltd. (Respondent) (*Granted*)

3593-93-G; 3594-93-G: International Union of Elevator Constructors, Local 50 (Applicant) v. Otis Canada Inc. (Respondent); International Union of Elevator Constructors, Local 50 (Applicant) v. Montgomery KONE Elevator Co. (Respondent) (*Granted*)

3605-93-G: United Brotherhood of Carpenters and Joiners of America, Local Union 2041 (Applicant) v. Antonio Sorbera Partitions (Respondent) (*Granted*)

3654-93-G: United Brotherhood of Carpenters and Joiners of America, Local 785 (Applicant) v. CPL Drywall and Acoustics Ltd. (Respondent) (*Withdrawn*)

3658-93-G: International Union of Operating Engineers, Local 793 (Applicant) v. Brennan Paving & Construction Ltd. (Respondent) (*Withdrawn*)

3732-93-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Robby Electric Limited (Respondent) (*Granted*)

3866-93-G: Ontario Council of the International Brotherhood of Painters and Allied Trades, Local 1891 (Applicant) v. Symetrical Drywall Interiors Ltd. and Tacapa Construction Div. of Tacapa Land Company Ltd. (Respondents) (*Withdrawn*)

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- 4108-93-G:** United Brotherhood of Carpenters and Joiners of America, Local 1316 (Applicant) v. York Lathing Inc. (Respondent) (*Withdrawn*)
- 4143-93-G:** Sheetmetal Workers' International Association and Ontario Sheet Metal Workers' Conference for Local 47 (Applicant) v. Revetements A.D.A. - Enr. and Structures Montreuil (Respondents) (*Withdrawn*)
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- 4369-93-G:** Labourers' International Union of North America, Local 183 (Applicant) v. Delfino Masonry Ltd. (Respondent) (*Granted*)
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**A Monthly Series of Decisions from the
Ontario Labour Relations Board**

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Selected decisions of particular reference value are also reported in *Canadian Labour Relations Boards Reports*, Butterworth & Co., Toronto.



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Combination of Bargaining Units - Bargaining Unit - Certification - Security Guard - Union seeking to combine newly certified unit of security guards with pre-existing all-employee unit of municipality's employees - Parties requesting that Board first determine whether security guards monitor other employees so as to give rise to conflict of interest if included in those employees' bargaining unit - Board satisfied that monitoring of other employees by guards raising real possibility of conflict of interest if guards included in same bargaining unit - Application remitted back to parties

THE MUNICIPALITY OF METROPOLITAN TORONTO; RE CUPE, LOCAL 79..... 795

Constitutional Law - Bargaining Unit - Certification - Charter of Rights and Freedoms - Employee - Membership Evidence - Board determining that section 8(4) of the *Act* not violating freedoms of expression, association and right to equal treatment set out in *Charter* - Board dismissing employees' objections to validity of trade union's membership evidence - Board finding union's proposed "all employee" unit appropriate and rejecting employer's assertion that the retail and service components of its business so distinct that employees in those components not sharing community of interests - Board finding "hardware department manager" to be "employee" within meaning of the *Act* - Certificate issuing

KEN BODNAR ENTERPRISES INC.; RE USWA; RE GROUP OF EMPLOYEES..... 688

Constitutional Law - Construction Industry - Ironworkers' union and other unions disputing various work assignments made to Power Workers' union in connection with fabrication and installation of monorail systems at nuclear generating station of Ontario Hydro - Power Workers' union challenging Board's constitutional jurisdiction to determine jurisdictional dispute involving nuclear facility - Board determining that work in dispute falling within provincial jurisdiction and that Board having constitutional jurisdiction to adjudicate dispute - Board directing that work in dispute be assigned to Ironworkers' union and other unions

ONTARIO HYDRO, EPSCA, CUPE, LOCAL 1000; RE BSOIW, LOCAL 736 752

Construction Industry - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by pro-

vincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal

ELLIS-DON LIMITED; THE OLRB AND IBEW, LOCAL 894.....

801

Construction Industry - Adjournment - Evidence - Judicial Review - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers' union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters' union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers' union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists - Carpenters' union applying for judicial review on grounds of alleged denial of natural justice - Divisional Court dismissing application with costs

VIC WEST STEEL LIMITED, ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 539 AND OLRB; RE CJA, LOCAL 1256.....

803

Construction Industry - Certification - Membership Evidence - Reconsideration - Settlement - Union certified after entering into minutes of settlement with employer regarding description of bargaining unit and list of employees at work on application date - Employer seeking reconsideration of certification decision and relying on various grounds, including assertion that it had not received legal advice prior to signing settlement document, that it included specimen signatures for only 4 of 5 employees on the list and that it did so only after the terminal date - Employer also alleging non-sign - Board finding no basis for doubting reliability of membership evidence filed or for reconsidering its decision on any other basis - Reconsideration application dismissed

MARLI MECHANICAL LTD.; RE UA, LOCAL UNION 46.....

725

Construction Industry - Constitutional Law - Ironworkers' union and other unions disputing various work assignments made to Power Workers' union in connection with fabrication and installation of monorail systems at nuclear generating station of Ontario Hydro - Power Workers' union challenging Board's constitutional jurisdiction to determine jurisdictional dispute involving nuclear facility - Board determining that work in dispute falling within provincial jurisdiction and that Board having constitutional jurisdiction to adjudicate dispute - Board directing that work in dispute be assigned to Ironworkers' union and other unions

ONTARIO HYDRO, EPSCA, CUPE, LOCAL 1000; RE BSOIW, LOCAL 736

752

Construction Industry - Discharge - Duty of Fair Referral - Duty of Fair Representation - Intimidation and Coercion - Practice and Procedure - Unfair Labour Practice - Board dismissing objection to vice-chair sitting alone in this case - Applicant complaining of threats related to his participation in Board proceeding, union charges laid against the applicant, the refusal

to permit the applicant to lay union charges against a fellow member, the failure to refer the applicant to work on certain project, the union's failure to assist him with certain grievances, his discharge, and being struck from the hiring hall referral list because of his improper expulsion from the union - Responding parties asking Board to dismiss application on grounds of undue delay - Board considering effect of delay in construction industry - Board dismissing all aspects of complaint for delay, except for allegation concerning removal of applicant from hiring hall list - Nine month delay in respect of referral issue not so long as to cause Board to decline to hear complaint

ROBERT DUMEAH; RE BSOIW LOCAL 700, K.E.W. STEEL FABRICATORS LTD. 655

Construction Industry - Discharge - Construction Industry Grievance - Employer's decision to remove grievor's seniority made contrary to collective agreement requiring written notice by registered mail to return to work - Grievor subsequently incorrectly laid off - Grievance allowed - Reinstatement with compensation ordered

CHICAGO BLOWER, DIVISION OF EARLSCOURT METAL; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30..... 645

Construction Industry - Discharge - Discharge for Union Activity - Practice and Procedure - Unfair Labour Practice - Board finding union's 8 1/2 month delay in bringing application undue and without justification - Application dismissed

EASTERN WELDING, 655270 ONTARIO INC. C.O.B. AS; RE UA, LOCAL UNION 819 673

Construction Industry Grievance - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal

ELLIS-DON LIMITED; THE OLRB AND IBEW, LOCAL 894..... 801

Construction Industry Grievance - Discharge - Construction Industry - Employer's decision to remove grievor's seniority made contrary to collective agreement requiring written notice by registered mail to return to work - Grievor subsequently incorrectly laid off - Grievance allowed - Reinstatement with compensation ordered

CHICAGO BLOWER, DIVISION OF EARLSCOURT METAL; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30..... 645

Discharge - Construction Industry - Construction Industry Grievance - Employer's decision to remove grievor's seniority made contrary to collective agreement requiring written notice by registered mail to return to work - Grievor subsequently incorrectly laid off - Grievance allowed - Reinstatement with compensation ordered

CHICAGO BLOWER, DIVISION OF EARLSCOURT METAL; RE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 30..... 645

VIII

- Discharge - Construction Industry - Duty of Fair Referral - Duty of Fair Representation - Intimidation and Coercion - Practice and Procedure - Unfair Labour Practice - Board dismissing objection to vice-chair sitting alone in this case - Applicant complaining of threats related to his participation in Board proceeding, union charges laid against the applicant, the refusal to permit the applicant to lay union charges against a fellow member, the failure to refer the applicant to work on certain project, the union's failure to assist him with certain grievances, his discharge, and being struck from the hiring hall referral list because of his improper expulsion from the union - Responding parties asking Board to dismiss application on grounds of undue delay - Board considering effect of delay in construction industry - Board dismissing all aspects of complaint for delay, except for allegation concerning removal of applicant from hiring hall list - Nine month delay in respect of referral issue not so long as to cause Board to decline to hear complaint
- ROBERT DUMEAH; RE BSOIW LOCAL 700, K.E.W. STEEL FABRICATORS LTD. 655
- Discharge - Construction Industry - Discharge for Union Activity - Practice and Procedure - Unfair Labour Practice - Board finding union's 8 1/2 month delay in bringing application undue and without justification - Application dismissed
- EASTERN WELDING, 655270 ONTARIO INC. C.O.B. AS; RE UA, LOCAL UNION 819 673
- Discharge - Discharge for Union Activity - Unfair Labour Practice - Discharged employees reinstated by different Board panel on interim basis pending determination of unfair labour practice complaint - At hearing on merits of unfair labour practice complaint, union also complaining about manner of interim reinstatement - Board finding employer in violation of the *Act* in respect of interim reinstatement by reinstating grievors to night shift and to job mix that was not reflective of range of duties normally performed - In respect of main complaint, Board finding employees' discharges tainted by anti-union *animus* and directing permanent reinstatement with compensation
- TATE ANDALE CANADA INC.; RE USWA..... 781
- Discharge for Union Activity - Construction Industry - Discharge - Practice and Procedure - Unfair Labour Practice - Board finding union's 8 1/2 month delay in bringing application undue and without justification - Application dismissed
- EASTERN WELDING, 655270 ONTARIO INC. C.O.B. AS; RE UA, LOCAL UNION 819 673
- Discharge for Union Activity - Discharge - Unfair Labour Practice - Discharged employees reinstated by different Board panel on interim basis pending determination of unfair labour practice complaint - At hearing on merits of unfair labour practice complaint, union also complaining about manner of interim reinstatement - Board finding employer in violation of the *Act* in respect of interim reinstatement by reinstating grievors to night shift and to job mix that was not reflective of range of duties normally performed - In respect of main complaint, Board finding employees' discharges tainted by anti-union *animus* and directing permanent reinstatement with compensation
- TATE ANDALE CANADA INC.; RE USWA..... 781
- Duty to Bargain in Good Faith - Adjustment Plan - Practice and Procedure - Unfair Labour Practice - Union alleging that employer breaching duty to bargain in good faith and make every reasonable effort to negotiate adjustment plan - Subsequent to hearing of complaint, and while decision pending, Board informed by employer that parties had reached collective agreement including terms on certain adjustment issues and that application rendered moot - Union disputing employer's position - Board dismissing application on grounds on moot-

ness, and on grounds that it would serve no labour relations purpose to inquire further into application because no remedial relief would be ordered

ONTARIO HYDRO; RE POWER WORKERS UNION, CUPE LOCAL 1000 765

Duty of Fair Referral - Construction Industry - Discharge - Duty of Fair Representation - Intimidation and Coercion - Practice and Procedure - Unfair Labour Practice - Board dismissing objection to vice-chair sitting alone in this case - Applicant complaining of threats related to his participation in Board proceeding, union charges laid against the applicant, the refusal to permit the applicant to lay union charges against a fellow member, the failure to refer the applicant to work on certain project, the union's failure to assist him with certain grievances, his discharge, and being struck from the hiring hall referral list because of his improper expulsion from the union - Responding parties asking Board to dismiss application on grounds of undue delay - Board considering effect of delay in construction industry - Board dismissing all aspects of complaint for delay, except for allegation concerning removal of applicant from hiring hall list - Nine month delay in respect of referral issue not so long as to cause Board to decline to hear complaint

ROBERT DUMEAH; RE BSOIW LOCAL 700, K.E.W. STEEL FABRICATORS LTD. 655

Duty of Fair Referral - Intimidation and Coercion - Remedies - Unfair Labour Practice - Applicant working as owner-operator under agreement between Pipe Line Contractors and Teamsters' union - Board concluding that union's actions in introducing rotation system, referring applicant to Deep River following lay-off from Stittsville loop, handling of applicant's grievance and various other matters not violating union's duty of fair referral - Board finding that union's refusal to allow applicant to pay union dues, renew membership and restore name to dispatch list designed to penalize him for filing complaint with the Board, contrary to section 82(2) of the *Act* - Union directed to compensate applicant for lost earnings and to restore applicant's name to dispatch list upon his tendering payment of outstanding dues

LOUIS LAUZON; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 91 717

Duty of Fair Representation - Construction Industry - Discharge - Duty of Fair Referral - Intimidation and Coercion - Practice and Procedure - Unfair Labour Practice - Board dismissing objection to vice-chair sitting alone in this case - Applicant complaining of threats related to his participation in Board proceeding, union charges laid against the applicant, the refusal to permit the applicant to lay union charges against a fellow member, the failure to refer the applicant to work on certain project, the union's failure to assist him with certain grievances, his discharge, and being struck from the hiring hall referral list because of his improper expulsion from the union - Responding parties asking Board to dismiss application on grounds of undue delay - Board considering effect of delay in construction industry - Board dismissing all aspects of complaint for delay, except for allegation concerning removal of applicant from hiring hall list - Nine month delay in respect of referral issue not so long as to cause Board to decline to hear complaint

ROBERT DUMEAH; RE BSOIW LOCAL 700, K.E.W. STEEL FABRICATORS LTD. 655

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Applicants asserting that decision not to take their job posting grievance to arbitration violating union's duty of fair representation - Board declining to inquire into application having regard to delay in filing it, previous parallel proceeding, likelihood of success, nature and

utility of any remedy that might flow, cost implications, passage of time from critical events, and shifting labour relations situation - Application dismissed

MIRZA ALAM, BRIAN AMES, MAHMOOD ANSARI, MOHD ASLAM, BRUCE BOULTON, ROBERT CAMPBELL, ASHTON CASPERSZ, JANA CIBULKA, ED FODEN, ARTHUR GLEGHORN, NIKOLAS ILKOS, JOE KAROL, STEVE KIRILOVIC, ANTHONY KORSMAN, SHU-TAK KWAN, FRED LA ROCHE, MAHENDAR MAKIM, CAROLYN OAKS, RAJ PURI, VINCE RISI, PHIL RUSSELL, DANNY SAMSON, FRANK SINDELAR, HANK TEEUWISSEN, STAN TRAKALO, BILL TYNDALL AND MICHAEL WONG; RE POWER WORKERS' UNION - CUPE LOCAL 1000; RE ONTARIO HYDRO

627

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Applicant asserting that union's handling of grievance violating the *Act* - Board receiving evidence of the Applicant and then advising parties that it wished to hear their submissions - Board explaining reasons for its intervention and procedural direction - Board concluding that union did not violate the *Act* in respect of any of its actions - Application dismissed

COVINGTON CLARKE; LOCAL 400 F.W.D. - INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AFL-CIO/LA-Z-BOY CANADA LIMITED

649

Duty of Fair Representation - Ratification and Strike Vote - Witness - Unfair Labour Practice - Applicant alleging that union breached *Act* when it negotiated and secured employee ratification of agreement permitting third shift in employer's Oshawa truck plant - Applicant complaining about process by which agreement concluded - Applicant also complaining about conduct allegedly intended to intimidate or penalize witnesses in Board proceeding - Board concluding that allegations without foundation - Application dismissed

MARY ANNE GREEN, CAW LOCAL 222 UNION MEMBER; RE JOHN CAINES, CAW LOCAL 222 UNION PLANT CHAIRPERSON; RE GENERAL MOTORS OF CANADA LIMITED ("GMCL")

677

Employee - Bargaining Unit - Certification - Constitutional Law - Charter of Rights and Freedoms - Membership Evidence - Board determining that section 8(4) of the *Act* not violating freedoms of expression, association and right to equal treatment set out in *Charter* - Board dismissing employees' objections to validity of trade union's membership evidence - Board finding union's proposed "all employee" unit appropriate and rejecting employer's assertion that the retail and service components of its business so distinct that employees in those components not sharing community of interests - Board finding "hardware department manager" to be "employee" within meaning of the *Act* - Certificate issuing

KEN BODNAR ENTERPRISES INC.; RE USWA; RE GROUP OF EMPLOYEES.....

688

Employee - Bargaining Unit - Certification - Board finding "shift supervisors" to be employees within meaning of the *Act* - Employer and union disputing description of appropriate bargaining unit - Union proposing unit excluding office and sales staff - Employer asserting that excluding office and sales staff would not reflect communities of interest in plant and would lead to serious labour relations problems - Board finding reference to "community of interest" to be unhelpful - Board's focus should be upon evidence of concrete, demonstrable problems which will result from applicant's proposed unit - Board finding union's proposed unit appropriate

ACTIVE MOLD PLASTIC PRODUCTS LTD.; RE NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA

617

Employer Support - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Judicial Review - Natural Justice

- Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal

ELLIS-DON LIMITED; THE OLRB AND IBEW, LOCAL 894..... 801

Evidence - Adjournment - Construction Industry - Judicial Review - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers' union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters' union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers' union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists - Carpenters' union applying for judicial review on grounds of alleged denial of natural justice - Divisional Court dismissing application with costs

VIC WEST STEEL LIMITED, ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 539 AND OLRB; RE CJA, LOCAL 1256..... 803

Interference in Trade Unions - Unfair Labour Practice - Employer prohibiting wearing of union buttons on threat of discipline violating the *Act* - Application allowed

METROLAND PRINTING, PUBLISHING AND DISTRIBUTING; RE SOUTHERN ONTARIO NEWSPAPER GUILD 738

Interference with Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Board finding employer's remarks to group of employees calculated to use promises to undermine union's legitimate authority as bargaining agent and thus interfering with union's representation of its members - Application allowed

PHARMAPHIL, A DIVISION OF R.P. SCHERER CANADA INC.; RE UFCW, LOCAL 175 AND 633..... 770

Interim Relief - Certification - Practice and Procedure - Reconsideration - Stay - Employer applying for reconsideration of "bottom line" decision to certify union and seeking interim order staying Board's decision pending issuance of reasons for decision - Board explaining importance of avoiding delay in labour relations and practice of issuing "bottom line" decisions

with reasons to follow - Balance of harm weighing against staying Board's decision - Application dismissed

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA....

775

Intimidation and Coercion - Construction Industry - Discharge - Duty of Fair Referral - Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Board dismissing objection to vice-chair sitting alone in this case - Applicant complaining of threats related to his participation in Board proceeding, union charges laid against the applicant, the refusal to permit the applicant to lay union charges against a fellow member, the failure to refer the applicant to work on certain project, the union's failure to assist him with certain grievances, his discharge, and being struck from the hiring hall referral list because of his improper expulsion from the union - Responding parties asking Board to dismiss application on grounds of undue delay - Board considering effect of delay in construction industry - Board dismissing all aspects of complaint for delay, except for allegation concerning removal of applicant from hiring hall list - Nine month delay in respect of referral issue not so long as to cause Board to decline to hear complaint

ROBERT DUMEAH; RE BSOIW LOCAL 700, K.E.W. STEEL FABRICATORS LTD.

655

Intimidation and Coercion - Interference with Trade Unions - Unfair Labour Practice - Board finding employer's remarks to group of employees calculated to use promises to undermine union's legitimate authority as bargaining agent and thus interfering with union's representation of its members - Application allowed

PHARMAPHIL, A DIVISION OF R.P. SCHERER CANADA INC.; RE UFCW, LOCAL 175 AND 633.....

770

Intimidation and Coercion - Duty of Fair Referral - Remedies - Unfair Labour Practice - Applicant working as owner-operator under agreement between Pipe Line Contractors and Teamsters' union - Board concluding that union's actions in introducing rotation system, referring applicant to Deep River following lay-off from Stittsville loop, handling of applicant's grievance and various other matters not violating union's duty of fair referral - Board finding that union's refusal to allow applicant to pay union dues, renew membership and restore name to dispatch list designed to penalize him for filing complaint with the Board, contrary to section 82(2) of the *Act* - Union directed to compensate applicant for lost earnings and to restore applicant's name to dispatch list upon his tendering payment of outstanding dues

LOUIS LAUZON; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 91

717

Judicial Review - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing

appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal

ELLIS-DON LIMITED; THE OLRB AND IBEW, LOCAL 894..... 801

Judicial Review - Adjournment - Construction Industry - Evidence - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers' union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters' union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers' union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists - Carpenters' union applying for judicial review on grounds of alleged denial of natural justice - Divisional Court dismissing application with costs

VIC WEST STEEL LIMITED, ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 539 AND OLRB; RE CJA, LOCAL 1256..... 803

Judicial Review - Bargaining Unit - Certification - Practice and Procedure - Stay - Following participation in certification waiver programme and after agreeing on a number of issues related to union's certification application (including bargaining unit description), parties apparently agreeing to waive hearing - Legal identity of employer only issue apparently outstanding - Employer subsequently retaining new counsel, seeking to file additional materials and advising Board of its intention to attend officer meeting and Board hearing - Employer asking Board to find appropriate bargaining unit to be one other than that which had earlier been agreed to by the parties - Employer relying on fact that Waiver of Hearing Form A-5 not submitted for proposition that it had not agreed to waive hearing - Board not permitting employer to resile from agreement on bargaining unit - Board finding agreed-upon unit appropriate - Board indicating that it will consider employer request, if made, for hearing on question of legal identity of employer - Employer applying for judicial review on ground that Board declined jurisdiction to determine appropriate bargaining unit - Employer applying for stay pending judicial review - Stay application dismissed by Divisional Court

GLAZIER MEDICAL CENTRE; RE ONA AND THE OLRB 802

Jurisdictional Dispute - Adjournment - Construction Industry - Evidence - Judicial Review - Natural Justice - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers' union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters' union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers' union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists - Carpenters'

union applying for judicial review on grounds of alleged denial of natural justice - Divisional Court dismissing application with costs

VIC WEST STEEL LIMITED, ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 539 AND OLRB; RE CJA, LOCAL 1256.....

803

Jurisdictional Dispute - Practice and Procedure - OSSTF alleging that work of occasional teachers being improperly assigned to "study room supervisors" represented by CUPE - Board rejecting CUPE's argument that Minister of Education having exclusive jurisdiction to resolve dispute involving alleged contravention of *Education Act* - Board not persuaded to exercise its discretion not to inquire into complaint because of greater expertise of alternative decision-maker - Board directing the filing of supplementary materials, including witness lists and detailed outline of evidence witnesses intend to give

KENT COUNTY BOARD OF EDUCATION AND THE CUPE, LOCAL 2214; RE ONTARIO SECONDARY SCHOOL TEACHERS' FEDERATION

701

Membership Evidence - Bargaining Unit - Certification - Constitutional Law - Charter of Rights and Freedoms - Employee - Board determining that section 8(4) of the *Act* not violating freedoms of expression, association and right to equal treatment set out in *Charter* - Board dismissing employees' objections to validity of trade union's membership evidence - Board finding union's proposed "all employee" unit appropriate and rejecting employer's assertion that the retail and service components of its business so distinct that employees in those components not sharing community of interests - Board finding "hardware department manager" to be "employee" within meaning of the *Act* - Certificate issuing

KEN BODNAR ENTERPRISES INC.; RE USWA; RE GROUP OF EMPLOYEES.....

688

Membership Evidence - Certification - Construction Industry - Reconsideration - Settlement - Union certified after entering into minutes of settlement with employer regarding description of bargaining unit and list of employees at work on application date - Employer seeking reconsideration of certification decision and relying on various grounds, including assertion that it had not received legal advice prior to signing settlement document, that it included specimen signatures for only 4 of 5 employees on the list and that it did so only after the terminal date - Employer also alleging non-sign - Board finding no basis for doubting reliability of membership evidence filed or for reconsidering its decision on any other basis - Reconsideration application dismissed

MARLI MECHANICAL LTD.; RE UA, LOCAL UNION 46

725

Natural Justice - Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal

ELLIS-DON LIMITED; THE OLRB AND IBEW, LOCAL 894.....

801

Natural Justice - Adjournment - Construction Industry - Evidence - Judicial Review - Jurisdictional Dispute - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers' union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters' union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers' union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists - Carpenters' union applying for judicial review on grounds of alleged denial of natural justice - Divisional Court dismissing application with costs

VIC WEST STEEL LIMITED, ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 539 AND OLRB; RE CJA, LOCAL 1256.....

803

Practice and Procedure - Adjournment - Construction Industry - Evidence - Judicial Review - Jurisdictional Dispute - Natural Justice - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers' union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters' union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers' union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists - Carpenters' union applying for judicial review on grounds of alleged denial of natural justice - Divisional Court dismissing application with costs

VIC WEST STEEL LIMITED, ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 539 AND OLRB; RE CJA, LOCAL 1256.....

803

Practice and Procedure - Adjustment Plan - Duty to Bargain in Good Faith - Unfair Labour Practice - Union alleging that employer breaching duty to bargain in good faith and make every reasonable effort to negotiate adjustment plan - Subsequent to hearing of complaint, and while decision pending, Board informed by employer that parties had reached collective agreement including terms on certain adjustment issues and that application rendered moot - Union disputing employer's position - Board dismissing application on grounds on mootness, and on grounds that it would serve no labour relations purpose to inquire further into application because no remedial relief would be ordered

ONTARIO HYDRO; RE POWER WORKERS UNION, CUPE LOCAL 1000

765

Practice and Procedure - Bargaining Unit - Certification - Judicial Review - Stay - Following participation in certification waiver programme and after agreeing on a number of issues related to union's certification application (including bargaining unit description), parties apparently agreeing to waive hearing - Legal identity of employer only issue apparently outstanding - Employer subsequently retaining new counsel, seeking to file additional materi-

als and advising Board of its intention to attend officer meeting and Board hearing - Employer asking Board to find appropriate bargaining unit to be one other than that which had earlier been agreed to by the parties - Employer relying on fact that Waiver of Hearing Form A-5 not submitted for proposition that it had not agreed to waive hearing - Board not permitting employer to resile from agreement on bargaining unit - Board finding agreed-upon unit appropriate - Board indicating that it will consider employer request, if made, for hearing on question of legal identity of employer - Employer applying for judicial review on ground that Board declined jurisdiction to determine appropriate bargaining unit - Employer applying for stay pending judicial review - Stay application dismissed by Divisional Court

GLAZIER MEDICAL CENTRE; RE ONA AND THE OLRB 802

Practice and Procedure - Certification - Interim Relief - Reconsideration - Stay - Employer applying for reconsideration of "bottom line" decision to certify union and seeking interim order staying Board's decision pending issuance of reasons for decision - Board explaining importance of avoiding delay in labour relations and practice of issuing "bottom line" decisions with reasons to follow - Balance of harm weighing against staying Board's decision - Application dismissed

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA 775

Practice and Procedure - Construction Industry - Discharge - Discharge for Union Activity - Unfair Labour Practice - Board finding union's 8 1/2 month delay in bringing application undue and without justification - Application dismissed

EASTERN WELDING, 655270 ONTARIO INC. C.O.B. AS; RE UA, LOCAL UNION 819 673

Practice and Procedure - Construction Industry - Discharge - Duty of Fair Referral - Duty of Fair Representation - Intimidation and Coercion - Unfair Labour Practice - Board dismissing objection to vice-chair sitting alone in this case - Applicant complaining of threats related to his participation in Board proceeding, union charges laid against the applicant, the refusal to permit the applicant to lay union charges against a fellow member, the failure to refer the applicant to work on certain project, the union's failure to assist him with certain grievances, his discharge, and being struck from the hiring hall referral list because of his improper expulsion from the union - Responding parties asking Board to dismiss application on grounds of undue delay - Board considering effect of delay in construction industry - Board dismissing all aspects of complaint for delay, except for allegation concerning removal of applicant from hiring hall list - Nine month delay in respect of referral issue not so long as to cause Board to decline to hear complaint

ROBERT DUMEAH; RE BSOIW LOCAL 700, K.E.W. STEEL FABRICATORS LTD. 655

Practice and Procedure - Duty of Fair Representation - Unfair Labour Practice - Applicants asserting that decision not to take their job posting grievance to arbitration violating union's duty of fair representation - Board declining to inquire into application having regard to delay in filing it, previous parallel proceeding, likelihood of success, nature and utility of any remedy that might flow, cost implications, passage of time from critical events, and shifting labour relations situation - Application dismissed

MIRZA ALAM, BRIAN AMES, MAHMOOD ANSARI, MOHD ASLAM, BRUCE BOULTON, ROBERT CAMPBELL, ASHTON CASPERSZ, JANA CIBULKA, ED FODEN, ARTHUR GLEGHORN, NIKOLAS ILKOS, JOE KAROL, STEVE KIRILOVIC, ANTHONY KORSMAN, SHU-TAK KWAN, FRED LA ROCHE, MAHENDAR MAKIM, CAROLYN OAKS, RAJ PURI, VINCE RISI, PHIL RUSSELL, DANNY SAMSON, FRANK SINDELAR, HANK TEEUWISSEN, STAN TRAKALO, BILL TYNDALL AND MICHAEL WONG; RE POWER WORKERS' UNION - CUPE LOCAL 1000; RE ONTARIO HYDRO 627

Practice and Procedure - Duty of Fair Representation - Unfair Labour Practice - Applicant asserting that union's handling of grievance violating the <i>Act</i> - Board receiving evidence of the Applicant and then advising parties that it wished to hear their submissions - Board explaining reasons for its intervention and procedural direction - Board concluding that union did not violate the <i>Act</i> in respect of any of its actions - Application dismissed	
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Practice and Procedure - Jurisdictional Dispute - OSSTF alleging that work of occasional teachers being improperly assigned to "study room supervisors" represented by CUPE - Board rejecting CUPE's argument that Minister of Education having exclusive jurisdiction to resolve dispute involving alleged contravention of <i>Education Act</i> - Board not persuaded to exercise its discretion not to inquire into complaint because of greater expertise of alternative decision-maker - Board directing the filing of supplementary materials, including witness lists and detailed outline of evidence witnesses intend to give	
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MARLI MECHANICAL LTD.; RE UA, LOCAL UNION 46	725
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ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA	775
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restore name to dispatch list designed to penalize him for filing complaint with the Board, contrary to section 82(2) of the *Act* - Union directed to compensate applicant for lost earnings and to restore applicant's name to dispatch list upon his tendering payment of outstanding dues

LOUIS LAUZON; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 91 717

Security Guard - Bargaining Unit - Certification - Combination of Bargaining Units - Union seeking to combine newly certified unit of security guards with pre-existing all-employee unit of municipality's employees - Parties requesting that Board first determine whether security guards monitor other employees so as to give rise to conflict of interest if included in those employees' bargaining unit - Board satisfied that monitoring of other employees by guards raising real possibility of conflict of interest if guards included in same bargaining unit - Application remitted back to parties

THE MUNICIPALITY OF METROPOLITAN TORONTO; RE CUPE, LOCAL 79 795

Settlement - Certification - Construction Industry - Membership Evidence - Reconsideration - Union certified after entering into minutes of settlement with employer regarding description of bargaining unit and list of employees at work on application date - Employer seeking reconsideration of certification decision and relying on various grounds, including assertion that it had not received legal advice prior to signing settlement document, that it included specimen signatures for only 4 of 5 employees on the list and that it did so only after the terminal date - Employer also alleging non-sign - Board finding no basis for doubting reliability of membership evidence filed or for reconsidering its decision on any other basis - Reconsideration application dismissed

MARLI MECHANICAL LTD.; RE UA, LOCAL UNION 46 725

Specified Replacement Workers - Strike - Strike Replacement Workers - Ten stationary engineers employed at brewery's power plant commencing lawful strike - Employer using two managers from struck location, plus a third manager from non-struck location to do the struck work - Union applying for directions under section 73(12) of the *Act* in respect of use of third manager - Power plant requiring presence of stationary engineer 24 hours per day, 7 days per week - Scheduling for power plant normally involving three employees in 24 hour period each working 8 hours, with fourth employee to provide for days off - Employer asserting right to use, in addition to its two managers from the struck location, two specified replacement workers pursuant to section 73.2(3) to enable it to prevent danger to life, health or safety, destruction or serious deterioration of equipment or premises, or serious environmental damage - Board concluding that employer not satisfying its onus under section 73.2(15) and therefore not entitled to use specified replacement workers

LABATT'S ONTARIO BREWERIES, DIVISION OF LABATT BREWING COMPANY LIMITED; RE IUOE, LOCAL 772; RE BREWERY GENERAL AND PROFESSIONAL WORKERS' UNION 704

Stay - Bargaining Unit - Certification - Judicial Review - Practice and Procedure - Following participation in certification waiver programme and after agreeing on a number of issues related to union's certification application (including bargaining unit description), parties apparently agreeing to waive hearing - Legal identity of employer only issue apparently outstanding - Employer subsequently retaining new counsel, seeking to file additional materials and advising Board of its intention to attend officer meeting and Board hearing - Employer asking Board to find appropriate bargaining unit to be one other than that which had earlier been agreed to by the parties - Employer relying on fact that Waiver of Hearing Form A-5 not submitted for proposition that it had not agreed to waive hearing - Board not permitting employer to resile from agreement on bargaining unit - Board finding agreed-upon unit appropriate - Board indicating that it will consider employer request, if made, for

hearing on question of legal identity of employer - Employer applying for judicial review on ground that Board declined jurisdiction to determine appropriate bargaining unit - Employer applying for stay pending judicial review - Stay application dismissed by Divisional Court

GLAZIER MEDICAL CENTRE; RE ONA AND THE OLRB 802

Stay - Certification - Interim Relief - Practice and Procedure - Reconsideration - Employer applying for reconsideration of "bottom line" decision to certify union and seeking interim order staying Board's decision pending issuance of reasons for decision - Board explaining importance of avoiding delay in labour relations and practice of issuing "bottom line" decisions with reasons to follow - Balance of harm weighing against staying Board's decision - Application dismissed

ROYALGUARD VINYL CO., A DIVISION OF ROYPLAST LIMITED; RE USWA 775

Strike - Specified Replacement Workers - Strike Replacement Workers - Ten stationary engineers employed at brewery's power plant commencing lawful strike - Employer using two managers from struck location, plus a third manager from non-struck location to do the struck work - Union applying for directions under section 73(12) of the *Act* in respect of use of third manager - Power plant requiring presence of stationary engineer 24 hours per day, 7 days per week - Scheduling for power plant normally involving three employees in 24 hour period each working 8 hours, with fourth employee to provide for days off - Employer asserting right to use, in addition to its two managers from the struck location, two specified replacement workers pursuant to section 73.2(3) to enable it to prevent danger to life, health or safety, destruction or serious deterioration of equipment or premises, or serious environmental damage - Board concluding that employer not satisfying its onus under section 73.2(15) and therefore not entitled to use specified replacement workers

LABATT'S ONTARIO BREWERIES, DIVISION OF LABATT BREWING COMPANY LIMITED; RE IUOE, LOCAL 772; RE BREWERY GENERAL AND PROFESSIONAL WORKERS' UNION 704

Strike - Strike Replacement Workers - Unfair Labour Practice - Employer asserting right to have struck work performed by persons engaged, hired or transferred into pre-existing managerial positions after date of notice to bargain, so long as there is no net increase in size of employer's managerial complement - Board not accepting employer's assertion - Employer's use of various persons to perform struck found to violate *Act* - Complaint allowed - Cease and desist order issuing

MARRIOTT MANAGEMENT SERVICES; RE CUPE AND ITS LOCAL 229 729

Strike Replacement Workers - Strike - Specified Replacement Workers - Ten stationary engineers employed at brewery's power plant commencing lawful strike - Employer using two managers from struck location, plus a third manager from non-struck location to do the struck work - Union applying for directions under section 73(12) of the *Act* in respect of use of third manager - Power plant requiring presence of stationary engineer 24 hours per day, 7 days per week - Scheduling for power plant normally involving three employees in 24 hour period each working 8 hours, with fourth employee to provide for days off - Employer asserting right to use, in addition to its two managers from the struck location, two specified replacement workers pursuant to section 73.2(3) to enable it to prevent danger to life, health or safety, destruction or serious deterioration of equipment or premises, or serious environmental damage - Board concluding that employer not satisfying its onus under section 73.2(15) and therefore not entitled to use specified replacement workers

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- Strike Replacement Workers - Strike - Unfair Labour Practice - Employer asserting right to have struck work performed by persons engaged, hired or transferred into pre-existing managerial positions after date of notice to bargain, so long as there is no net increase in size of employer's managerial complement - Board not accepting employer's assertion - Employer's use of various persons to perform struck found to violate *Act* - Complaint allowed - Cease and desist order issuing
- MARRIOTT MANAGEMENT SERVICES; RE CUPE AND ITS LOCAL 229..... 729
- Unfair Labour Practice - Adjustment Plan - Duty to Bargain in Good Faith - Practice and Procedure - Union alleging that employer breaching duty to bargain in good faith and make every reasonable effort to negotiate adjustment plan - Subsequent to hearing of complaint, and while decision pending, Board informed by employer that parties had reached collective agreement including terms on certain adjustment issues and that application rendered moot - Union disputing employer's position - Board dismissing application on grounds on mootness, and on grounds that it would serve no labour relations purpose to inquire further into application because no remedial relief would be ordered
- ONTARIO HYDRO; RE POWER WORKERS UNION, CUPE LOCAL 1000 765
- Unfair Labour Practice - Construction Industry - Discharge - Discharge for Union Activity - Practice and Procedure - Board finding union's 8 1/2 month delay in bringing application undue and without justification - Application dismissed
- EASTERN WELDING, 655270 ONTARIO INC. C.O.B. AS; RE UA, LOCAL UNION 819 673
- Unfair Labour Practice - Construction Industry - Discharge - Duty of Fair Referral - Duty of Fair Representation - Intimidation and Coercion - Practice and Procedure - Board dismissing objection to vice-chair sitting alone in this case - Applicant complaining of threats related to his participation in Board proceeding, union charges laid against the applicant, the refusal to permit the applicant to lay union charges against a fellow member, the failure to refer the applicant to work on certain project, the union's failure to assist him with certain grievances, his discharge, and being struck from the hiring hall referral list because of his improper expulsion from the union - Responding parties asking Board to dismiss application on grounds of undue delay - Board considering effect of delay in construction industry - Board dismissing all aspects of complaint for delay, except for allegation concerning removal of applicant from hiring hall list - Nine month delay in respect of referral issue not so long as to cause Board to decline to hear complaint
- ROBERT DUMEAH; RE BSOIW LOCAL 700, K.E.W. STEEL FABRICATORS LTD. 655
- Unfair Labour Practice - Discharge - Discharge for Union Activity - Discharged employees reinstated by different Board panel on interim basis pending determination of unfair labour practice complaint - At hearing on merits of unfair labour practice complaint, union also complaining about manner of interim reinstatement - Board finding employer in violation of the *Act* in respect of interim reinstatement by reinstating grievors to night shift and to job mix that was not reflective of range of duties normally performed - In respect of main complaint, Board finding employees' discharges tainted by anti-union *animus* and directing permanent reinstatement with compensation
- TATE ANDALE CANADA INC.; RE USWA..... 781
- Unfair Labour Practice - Duty of Fair Referral - Intimidation and Coercion - Remedies - Applicant working as owner-operator under agreement between Pipe Line Contractors and Teamsters' union - Board concluding that union's actions in introducing rotation system, referring applicant to Deep River following lay-off from Stittsville loop, handling of applicant's grievance and various other matters not violating union's duty of fair referral - Board finding that union's refusal to allow applicant to pay union dues, renew membership and

restore name to dispatch list designed to penalize him for filing complaint with the Board, contrary to section 82(2) of the *Act* - Union directed to compensate applicant for lost earnings and to restore applicant's name to dispatch list upon his tendering payment of outstanding dues

LOUIS LAUZON; RE TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS, LOCAL 91

717

Unfair Labour Practice - Duty of Fair Representation - Ratification and Strike Vote - Witness - Applicant alleging that union breached *Act* when it negotiated and secured employee ratification of agreement permitting third shift in employer's Oshawa truck plant - Applicant complaining about process by which agreement concluded - Applicant also complaining about conduct allegedly intended to intimidate or penalize witnesses in Board proceeding - Board concluding that allegations without foundation - Application dismissed

MARY ANNE GREEN, CAW LOCAL 222 UNION MEMBER; RE JOHN CAINES, CAW LOCAL 222 UNION PLANT CHAIRPERSON; RE GENERAL MOTORS OF CANADA LIMITED ("GMCL")

677

Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Applicant asserting that union's handling of grievance violating the *Act* - Board receiving evidence of the Applicant and then advising parties that it wished to hear their submissions - Board explaining reasons for its intervention and procedural direction - Board concluding that union did not violate the *Act* in respect of any of its actions - Application dismissed

COVINGTON CLARKE; LOCAL 400 F.W.D. - INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, SALARIED, MACHINE AND FURNITURE WORKERS, AFL-CIO/LA-Z-BOY CANADA LIMITED

649

Unfair Labour Practice - Duty of Fair Representation - Practice and Procedure - Applicants asserting that decision not to take their job posting grievance to arbitration violating union's duty of fair representation - Board declining to inquire into application having regard to delay in filing it, previous parallel proceeding, likelihood of success, nature and utility of any remedy that might flow, cost implications, passage of time from critical events, and shifting labour relations situation - Application dismissed

MIRZA ALAM, BRIAN AMES, MAHMOOD ANSARI, MOHD ASLAM, BRUCE BOULTON, ROBERT CAMPBELL; ASHTON CASPERSZ, JANA CIBULKA, ED FODEN, ARTHUR GLEGHORN, NIKOLAS ILKOS, JOE KAROL, STEVE KIRILOVIC, ANTHONY KORSMAN, SHU-TAK KWAN, FRED LA ROCHE, MAHENDAR MAKIM, CAROLYN OAKS, RAJ PURI, VINCE RISI, PHIL RUSSELL, DANNY SAMSON, FRANK SINDELAR, HANK TEEUWISSEN, STAN TRAKALO, BILL TYNDALL AND MICHAEL WONG; RE POWER WORKERS' UNION - CUPE LOCAL 1000; RE ONTARIO HYDRO

627

Unfair Labour Practice - Interference with Trade Unions - Intimidation and Coercion - Board finding employer's remarks to group of employees calculated to use promises to undermine union's legitimate authority as bargaining agent and thus interfering with union's representation of its members - Application allowed

PHARMAPHIL, A DIVISION OF R.P. SCHERER CANADA INC.; RE UFCW, LOCAL 175 AND 633

770

Unfair Labour Practice - Interference in Trade Unions - Employer prohibiting wearing of union buttons on threat of discipline violating the *Act* - Application allowed

METROLAND PRINTING, PUBLISHING AND DISTRIBUTING; RE SOUTHERN ONTARIO NEWSPAPER GUILD

738

Unfair Labour Practice - Strike - Strike Replacement Workers - Employer asserting right to have

struck work performed by persons engaged, hired or transferred into pre-existing managerial positions after date of notice to bargain, so long as there is no net increase in size of employer's managerial complement - Board not accepting employer's assertion - Employer's use of various persons to perform struck found to violate *Act* - Complaint allowed - Cease and desist order issuing

MARRIOTT MANAGEMENT SERVICES; RE CUPE AND ITS LOCAL 229 729

Witness - Adjournment - Construction Industry - Evidence - Judicial Review - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers' union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters' union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers' union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists - Carpenters' union applying for judicial review on grounds of alleged denial of natural justice - Divisional Court dismissing application with costs

VIC WEST STEEL LIMITED, ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL 539 AND OLRB; RE CJA, LOCAL 1256..... 803

Witness - Duty of Fair Representation - Ratification and Strike Vote - Unfair Labour Practice - Applicant alleging that union breached *Act* when it negotiated and secured employee ratification of agreement permitting third shift in employer's Oshawa truck plant - Applicant complaining about process by which agreement concluded - Applicant also complaining about conduct allegedly intended to intimidate or penalize witnesses in Board proceeding - Board concluding that allegations without foundation - Application dismissed

MARY ANNE GREEN, CAW LOCAL 222 UNION MEMBER; RE JOHN CAINES, CAW LOCAL 222 UNION PLANT CHAIRPERSON; RE GENERAL MOTORS OF CANADA LIMITED ("GMCL") 677

4132-93-R National Automobile, Aerospace and Agricultural Implement Workers Union of Canada, Applicant v. Active Mold Plastic Products Ltd., Responding Party

Bargaining Unit - Certification - Employee - Board finding “shift supervisors” to be employees within meaning of the Act - Employer and union disputing description of appropriate bargaining unit - Union proposing unit excluding office and sales staff - Employer asserting that excluding office and sales staff would not reflect communities of interest in plant and would lead to serious labour relations problems - Board finding reference to “community of interest” to be unhelpful - Board’s focus should be upon evidence of concrete, demonstrable problems which will result from applicant’s proposed unit - Board finding union’s proposed unit appropriate

BEFORE: *Lee Shouldice*, Vice-Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

APPEARANCES: *Catherine Gilbert* and *Dan Flynn* for the applicant; *Michael G. Sherrard* and *R. Neil Arnold* for the responding party.

DECISION OF LEE SHOULDICE, VICE-CHAIR, AND BOARD MEMBER, W. A. CORRELL;
June 1, 1994

1. This is an application for certification. At the conclusion of evidence and argument, the Board delivered the following oral decision:

We are of the view that the shift supervisors - Joseph Bosse, Krista Schultz and Paul McManus - are “employees” as defined by the *Labour Relations Act* and should be included in the bargaining unit.

We are of the view that the appropriate bargaining unit is as follows:

all employees of Active Mold Plastic Products Limited in the Town of Oldcastle, save and except managers, persons above the rank of manager, office, clerical, technical and sales staff.

We are of the view that Mr. DeAngelis is properly excluded from the bargaining unit as a technical employee, and that Ms. De Santis is properly excluded from the bargaining unit as an office employee. The parties have agreed that Mr. McBride is excluded from the bargaining unit as he exercises managerial functions.

The last issue is the status of Jennifer Carpenter. The majority of the Board is of the view, Board Member Armstrong dissenting, that Ms. Carpenter is properly characterized as a production employee and therefore is properly included in the bargaining unit.

Reasons for our decision will issue at a later date.

These are the reasons for that decision.

2. Prior to the hearing of this matter, the parties reached substantial agreement as to the description of the bargaining unit. The issues that remained were whether the three shift supervisors were “employees” for the purposes of the *Labour Relations Act*, and whether the applicant’s request that office, clerical, technical and sales staff be excluded from the bargaining unit reflected an appropriate bargaining unit for the purposes of collective bargaining. Evidence was called by the parties on these issues. Over the course of three hearing days the Board heard the testimony of seven witnesses.

(a) Shift Supervisors - s. 1(3) of the Labour Relations Act

3. It was the applicant's position that the three shift supervisors exercise managerial functions and therefore ought to be excluded from the bargaining unit. It was the responding party's position that the shift supervisors were "employees" and were properly members of the bargaining unit. The Board heard the evidence of the three shift supervisors: Joseph Bosse, Krista Schultz and Paul McManus - as well as the evidence of other individuals - regarding the duties and responsibilities of the shift supervisors.

4. The evidence before the Board discloses that Active Mold Plastic Products Ltd. (hereinafter "Active Mold" or "the employer") is a manufacturer of injected molded automotive parts. The employer operates on 3 shifts. Shift supervisors work on each of the shifts, Mr. Bosse and Ms. Schultz rotating between the day and afternoon shifts, and Mr. McManus working on the night shift.

5. Prior to the commencement of a typical shift, the incoming shift supervisor and the incoming quality control ("Q.C.") representative meets with the outgoing shift supervisor and the outgoing Q.C. representative in order to discuss the operations on the outgoing shift - how the 12 machines operated, what type of product was run on the machines, how it ran, and any quality problem that the new shift should look for. Once this discussion is completed, the shift supervisor checks all of the machines and the materials at the machines. Material handlers are sought out for discussion if one or more machines are to be changed over to a new product or to a new colour of resin. There is an information log which is prepared by Jim Ouellette, the Plant Manager, that outlines what production each machine will run for the next 24 hours. Each shift supervisor refers to this log prior to commencement of his or her shift.

6. At the commencement of the shift, the shift supervisor assigns the incoming employees to the various machines which are to run on the shift. The shift supervisor does not determine the number of people who work per shift (Mr. Ouellette is responsible for this decision), but he or she makes the assignment of workers to particular machines based upon the level of experience of the individuals with the particular machines. If inexperienced people are assigned to any particular shift (the evidence suggests that there is a significant turnover of machine operators), the shift supervisor assigns the Q.C. representative or someone with experience to assist the person. The assignment to machines by the shift supervisor at the outset of the shift takes approximately 30 minutes.

7. Once employees are assigned to machines, the shift supervisor determines a relief schedule. The machines run continuously and the shift supervisor must ensure that relief individuals are available to cover for employees on their scheduled breaks. Employees such as Q.C. representatives, material handlers, grinders and the janitor are assigned to relief assignments. Once relief assignments are made, the shift supervisor reviews the time cards to ensure that everyone has punched in on time (lates are marked) and, on an off-shift, a door check of the building is completed. Should re-assignments be required during the shift, the shift supervisor is responsible for making such re-assignments.

8. For the remainder of the shift, the shift supervisor performs numerous and varied tasks. The shift supervisors load and unload trucks, as necessary, prepare packing slips, make boxes, package products at the machines, use a forklift to remove skids of finished goods, sweep the plant, and help the material handlers put resin into the hoppers at the machines. At the end of the shift, a report is prepared by the shift supervisor for the Plant Manager reflecting the downtime of each machine, and a meeting is held with the next shift supervisor to discuss production issues on the outgoing shift.

9. Shift supervisors are paid hourly, and punch a time clock as do other employees. Overtime work is compensated by payment of 1 1/2 times their hourly wage for each hour worked over 40 hours worked per week. The Plant Manager is generally on the premises from 8:00 a.m. to 6:00 p.m. or 7:00 p.m., and thus the shift supervisor is often the most senior ranking individual on the premises.

10. It is Mr. Ouellette, the Plant Manager, who schedules the employees on the various shift rotations. If, however, a certain product is to be run on a shift, and a shift supervisor desires someone with experience on that shift, he or she will speak to Mr. Ouellette and an arrangement will be made to ensure someone with the required experience is assigned to the shift. Vacations are scheduled by Mr. Ouellette, though requests are usually provided by employees to the shift supervisors.

11. The shift supervisors play no role in the hiring process. They do not interview or hire employees. Likewise, they play no role in the firing of employees. The evidence suggests that the shift supervisors play a limited role in the discipline of employees. The shift supervisor, if faced with a potential disciplinary event, will discuss the situation with the employee and attempt to work out the problem. If the problem is performance related and reoccurs, the shift supervisor will raise the matter with Mr. Ouellette and discuss the situation with him. Any discipline imposed on an employee is that decided by and meted out by Mr. Ouellette. If the problem is one of a more immediate nature, the shift supervisors have the authority to send employees home, but are to advise Mr. Ouellette of the occurrence, who deals with the employee the next day. The shift supervisors are unaware whether an employee who is sent home by them loses pay.

12. The shift supervisors do have some influence with respect to the various temporary workers who work in the plant side by side with Active Mold employees. These workers are employed by temporary agencies and the evidence suggests that the shift supervisors, if they incur a performance problem with a temporary agency worker, speak to Mr. Ouellette, who has required the temporary agency to remove the worker from the plant. As well, the shift supervisors are asked by Mr. Ouellette for their views of an individual when he is considering an offer of employment to a temporary worker at the plant.

13. With respect to overtime, most overtime at the plant is worked on the weekend. On approximately Wednesday or Thursday of each week, Mr. Ouellette advises the shift supervisors of the number of machines which will be running on the weekend. The shift supervisors canvass the employees on their shift and provide Mr. Ouellette with a list of employees willing to work on the weekend. Mr. Ouellette determines the number of employees needed for weekend overtime work, and who will work the overtime. Any overtime needed during the week is determined by the shift supervisor and the shift supervisor asks the required number of employees, if any, to stay to work overtime.

14. Shift supervisors do not complete performance evaluations on the workers in the plant. They have an office in the plant which has a file cabinet but no employee records are kept in the cabinet. Two of the supervisors keep personal records of "goings on" for the purposes of historical recall but it is not used by them for disciplinary purposes. The office is used by technicians and Q.C. representatives but very infrequently by employees in the plant. Shift supervisors keep tools, gloves, knives and other work-related necessities in the office. They typically spend a small portion of their work day in the office, spending most the day on the plant floor.

15. Shift supervisors do receive requests for time off, but typically bring those requests to Mr. Ouellette. It is ultimately Mr. Ouellette who determines whether such time off is granted. With respect to shift swaps, the employees will, once an arrangement has been made between

them, go to the shift supervisor for approval of the agreed upon shift change. There was no evidence that such a shift swap had ever been not approved by the shift supervisor. In the event that an employee is going to be late for his or her shift, the shift supervisor is usually called, though at times reception or Mr. Ouellette can receive that type of call.

16. It is Mr. Ouellette who sets the hourly rate of pay and who determines what, if any, wage raises are to be given to plant employees. Although each shift supervisor earned a different hourly wage, their wages are generally substantially higher than the production workers in the plant.

17. It was on this evidence that the parties argued the applicability of section 1(3) of the Act. Counsel for the responding party submitted that the real authority in the plant - the authority to hire, fire, discipline, promote and demote - rests with the Plant Manager. Counsel urged the Board to focus on the evidence of Mr. Ouellette, who testified that his decisions were the result of a wide range of opinions from the floor. Counsel conceded that shift supervisors are left in the plant on their own for significant periods of time, but noted that their abilities to make decisions are limited to pre-established parameters, and described the shift supervisors as "conduits of information". Counsel submitted that the onus of showing that the shift supervisors were properly excluded from collective bargaining lies with the applicant, and that it must establish clear and cogent evidence for so doing. Counsel relied upon the decisions of *Wellington Separate Support Staff Association* (unreported, Board File 4074-91-M, September 15, 1993); *Cichon Enterprises Limited, c.o.b. as Imperial Dust Control* (unreported, Board File 1139-93-R, December 16, 1993); and *The Corporation of The City of Thunder Bay* [1981] OLRB Rep. Aug. 1121.

18. Counsel for the applicant urged the Board to exclude the three supervisors as performing managerial functions. The applicant submitted that the Board should be wary of including in the bargaining unit those individuals who would be placed in a conflict of interest position. Counsel noted that the shift supervisors testified that they believed their main role to be supervisory in nature, and performed other work only "as needed". Counsel observed that the shift supervisors, if included in the bargaining unit, would be responsible for the plant when Mr. Ouellette was absent - a situation that she characterized as "hard to believe". Counsel submitted that, although the shift supervisors are limited in their authority to hire, fire, discipline and promote, they do have authority which directly impacts on the employment relationship, noting in particular the authority to send an employee home. Counsel noted as well the involvement that shift supervisors have in the fate of temporary workers in the plant. Counsel characterized the hands on work performed by supervisors as incidental to the shift supervisors' main task of supervising employees on the floor. Counsel referred the Board to *Ford Motor Company of Canada, Limited* [1993] OLRB Rep. Jan. 1, and *Re Cabral Foods Inc.* (1990), 11 L.A.C. (4th) 370 (Blair).

19. Section 1(3) of the Act provides as follows:

1. (3) For the purposes of this Act, no person shall be deemed to be an employee who, in the opinion of the Board, exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations.

It is apparent from a reading of section 1(3) of the Act that there are two grounds upon which individuals can be excluded from collective bargaining. Should an individual exercise managerial functions he or she will be so excluded. The individual must make independent decisions on important matters of policy or the running of the organization, or make effective recommendations on matters having a direct impact on terms and conditions of employment. Alternatively, should the individual have regular and material involvement in matters which impact upon collective agreement negotiations or the employer's collective bargaining strategy, the confidential exclusion will apply.

The underlying basis for these two exclusions is not difficult to discern - it is important to ensure that those individuals who have managerial or confidential duties remain free of any conflicting interest which may influence them in the proper and faithful execution of their duties.

20. In *The Corporation of the City of Thunder Bay* [1981] OLRB Rep. Aug. 1121, the Board made the following observations regarding “first line” managerial employees:

3. *The Labour Relations Act* does not contain a definition of the term “managerial function”, nor are there any specified criteria to guide the Board in reaching its opinion. The task of developing such criteria has fallen to the Board itself, and in recognition of the fact that the exercise of managerial functions can assume different forms in different work settings, the Board has, over the years, evolved various general approaches to assist it in its inquiry. In the case of so called “first line” managerial employees, the important question is the extent to which they make decisions which affect the economic lives of their fellow employees thereby raising a potential conflict of interest with them. Thus, the right to hire, fire, promote, demote, grant wage increases or discipline employees are all manifestations of managerial authority, and the exercise of such authority is incompatible with participation in trade union activities as an ordinary member of the bargaining unit. In the case of more senior managerial personnel whose decision-making may have a less direct or immediate impact on bargaining unit employees, the Board has focused on the degree of independent decision-making authority over important aspects of the employer’s business. It is evident that persons making significant executive or business decisions should be considered a part of the “management team” even though they do not exercise the kind of direct authority over employees which is characteristic of a first line foreman.

4. The line between “employee” and “management” is often shaded, and while it is helpful to consider the principles articulated by the Board in previous cases, ultimately the determination must turn on the facts of the particular case. There is no litmus test which is universally applicable and dictates the result in every situation, and in assessing each case, the Board must have due regard to the nature of the industry, the nature of the particular business, and individual employer’s organizational scheme. There must, of course, be a rational relationship between the number of superiors and subordinates, consultation or “input” should not be confused with decision-making, and neither technical expertise nor the importance of an employee’s function can be automatically equated with managerial status. On the other hand, there may be individuals whose nominal authority appears to be limited, and who have no formal managerial position or title, but who nevertheless make recommendations affecting the economic destiny of their fellow employees which are so frequently forthcoming, and consistently followed by superiors, that it can be said that, in fact, the effective decision is made by the challenged individual. It is this type of recommendation which the Board has characterized as an “effective recommendation” and the inclusion of these persons in the bargaining unit would raise the very kind of conflict of interest which section 1(3)(b) was designed to avoid. Persons making “effective recommendations” of this kind are regarded as part of the “management team”, and are excluded from the bargaining unit.

5. In each instance, the Board seeks to determine the nature and extent of the individual’s authority as well as the extent to which that authority is actually exercised. It is not sufficient if an individual has only “paper powers” contained in a job description or a “managerial” job title, if managerial functions are not actually exercised. Even the performance of certain co-ordinating functions may not be determinative. Where numbers of people work at a common enterprise (especially in the white collar - service sector) many persons may be engaged in co-ordinating activities which are largely routine, carried out within a pre-established framework of rules and policies, and subject to real managerial authority which is actually exercised from above. In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced “journeymen” or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the

task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the “team” and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by section 1(3)(b) and must therefore be excluded from the ambit of collective bargaining - especially when most of their time is spent performing functions similar to those of other individuals in the bargaining unit and there is little or no evidence of the kind of conflict which section 1(3)(b) is designed to avoid. The situation of persons who exercise some degree of control over others, but who also perform bargaining unit work was discussed by the Board in *Falconbridge Nickel Mines Limited* [1966] OLRB Rep. Sept. 379, as follows:

Most of the persons in dispute have more than one function and generally speaking it is the weight or emphasis attached to the different functions which must determine on which side of the managerial line the persons fall. Senior or skilled employees often have more responsibilities than other rank and file employees and they exercise certain control and direction over the other employees because of their greater experience and skill. It is the Board’s difficult task to determine whether the additional responsibilities are managerial functions within the meaning of section 1(3)(b) of the Act or are merely incidental to the prime purpose for which the employee is engaged (i.e., to perform work properly performed by persons within the bargaining unit). If the majority of a person’s time is occupied by work similar to that performed by employees within the bargaining unit and such person has no effective control or authority over the employees in the bargaining unit but is merely a conduit carrying orders or instructions from management to the employees, the person cannot be said to exercise managerial functions within the meaning of section 1(3)(b) of the Act. On the other hand, if a person is primarily engaged in supervision and direction of other employees and has effective control over their employment relationship, even though the person occasionally performs work similar to the rank and file employees when an emergency arises or to relieve an employee during occasional periods of absence or even to perform a particularly important job requiring special skill and experience, such occasional work in no way derogates from his prime function as a person employed in a managerial capacity. When assessing a person’s duties and responsibilities the Board does not look at any one function in isolation but views all functions in their entirety. As stated in the *McDougall Case* above referred to, titles alone are not much assistance in determining what a person’s functions really are ...

The cases cited above would seem to indicate that while a person may have minor supervisory function or very limited confidential function in matters relating to labour relations, if such functions are merely incidental to their main function and are of such a nature that they cannot be said to materially effect the employment relationship of the respondent’s employees, such persons should not be excluded from collective bargaining by reason of section 1(3)(b) of the Act. Unless a person who regularly performs work similar to persons in a bargaining unit has independent discretionary powers rather than merely incidental reporting functions which are subject to the discretion and authority of higher persons in management, there is no reason to exclude such a person from collective bargaining.

In other words, in determining an individual’s status, one cannot look at a portion of his duties in isolation. If the functions of an allegedly “managerial” character occupy only a minor part of his time, it is unlikely that he will be excluded from the ambit of collective bargaining unless those functions involve a decisive impact on his fellow employees. (For example, a unilateral decision to fire an employee would be highly significant, even if the exercise of such power is infrequent; while incidental supervisory responsibilities do not raise the kind of conflict of interest underlying section 1(3)(b).

We agree with the observations of the Board in that decision.

21. In the case of the shift supervisors whose status is in issue before us, there is no suggestion that they have any policy making authority for the employer. Accordingly, the question to be determined by the Board is whether these individuals make “effective recommendations on mat-

ters having a direct impact on terms and conditions of employment". In our view, particular consideration must be given to the caution made in *The Corporation of the City of Thunder Bay, supra*, that "consultation or 'input' should not be confused with decision making". On the facts before us, it is abundantly clear that the shift supervisors do not independently make decisions affecting the "economic destiny" of the plant workers. They do not hire, fire, discipline, promote or demote employees of Active Mold. They do not determine wage levels, wage increases or even perform performance evaluations which would be utilized to determine wage increases. Putting the evidence at its very highest, the shift supervisors act as conduits, bringing information to the Plant Manager which the Plant Manager may or may not act upon, and, if acted upon, only after further discussion by the Plant Manager with others at the plant. It is evident that the real authority at the plant lies with the Plant Manager and not with the shift supervisors.

22. The fact that the shift supervisors have had input into the decision to hire temporary workers as employees is a factor to be taken into account by the Board, but it is not determinative. If anything, the evidence highlights the lack of authority that the shift supervisors hold in the area of hiring and firing, in so far as their input is one of the factors considered by Mr. Ouellette when assessing a temporary worker who is *not* an employee of Active Mold, but seems to be far less significant when assessing an employee of the company. Contrary to the evidence given regarding temporary workers, there is no evidence to suggest that a shift supervisor, by talking to Mr. Ouellette, can "invariably" affect an employee's employment at the plant.

23. The evidence relied upon by the applicant as suggesting that shift supervisors have authority which directly impacts on the employment relationship, when taken in its totality, does not establish that impact to a degree which would lead us to decide that the ability to bargain collectively should be removed from these individuals. The shift supervisors indicated in cross examination that they perceived themselves to be "mostly" supervisors, performing other work tasks incidentally. Although that characterization by the shift supervisors themselves should not be too surprising, we are of the view that it, too, is not determinative, as the evidence strongly suggests that the supervisory aspects of their positions are proportionally fewer in number than the "hands on" tasks which they perform.

24. For these reasons, we are of the view that the shift supervisors are "employees" for the purposes of the *Labour Relations Act*.

(b) Appropriate Bargaining Unit

25. The Board heard a great deal of evidence regarding the status of a number of individuals and whether they should be "included or excluded" from the bargaining unit. We do not propose to set out the evidence of the witnesses in any great detail. For reasons which will become evident below, we do wish to outline the approach which we take to the issue of the bargaining unit description.

26. The dispute between the parties, as noted at the outset of this decision, revolved around the exclusion of "office, clerical, technical and sales" staff from the proposed bargaining unit. The applicant's position was that it desired such exclusions and ought to be granted them. The employer's position was that such exclusions were not reflective of the communities of interest in the plant and that, if granted, the exclusions would lead to serious labour relations problems. At the outset of the hearing, the Board reminded the parties that it was particularly interested in the evidence touching on the issue of serious labour relations problems, in accordance with the decision of the Board in *Hospital for Sick Children* [1985] OLRB Rep. Feb. 266.

27. In *Hospital for Sick Children, supra*, the Board undertook a fresh approach to the issue

of bargaining unit description. At paragraphs 14 of that decision, the Board made the following observations:

14. It will be seen that the statutory language has remained basically unchanged for more than four decades, and in the early years it provided the basis for making broad distinctions for bargaining unit purposes between such groups as: "white collar" office and technical employees, and "blue collar" production employees; skilled tradesmen (electricians, plumbers, sheet metal workers, etc.), and unskilled or semi-skilled workers; part-time employees and full-time employees; employees working for an employer in one plant or municipality and employees in another plant or municipality; and so on. However, these fairly simple, and then unexceptional distinctions, do not apply so easily today. Collective bargaining has extended beyond its traditional "blue collar" industrial base, into the public sector and to increasingly sophisticated and diverse job hierarchies. Real life collective bargaining experience has outstripped some of the conventional wisdom and has shown that the collective bargaining system can exhibit quite a variety of structures, which, at one time, parties might have considered unconventional or inappropriate. Ontario Hydro, for example, has a province-wide bargaining unit, encompassing a broad range of employee classifications, and thousands of employees, ranging from unskilled workers to highly trained technicians. A typical municipal "inside workers" (white collar) bargaining unit may include occupations ranging from filing clerks, to computer programmers, economists and planners with a considerable amount of post-secondary or even graduate training [see the Board's decision in *The Regional Municipality of Durham*, Board File 1818-94-R, decision released November 20, 1984]. The Ontario Civil Service bargaining unit contains thousands of employees ranging from clerks and typists to sophisticated scientific and technical personnel - and, incidentally, the staff of a number of provincial psychiatric hospitals (see: *Owen Sound General and Marine Hospital*, [1978] OLRB Rep. May 445, when the Board noted that in the government sector nurses, paramedicals, service employees, and clericals are all in the same unit, even though under the *Labour Relations Act*, they have typically been segregated into separate units). While at one time common opinion and industrial relations practice might have supported fairly rigid (almost "class") divisions between employee groups, modern collective bargaining seems to be able to thrive quite well in many contexts without such rigid distinctions. It is no longer as easy as it once was to say that it is "inappropriate" to group together for collective bargaining purposes, employees with quite diverse skills, education, training, position in the job hierarchy or probable aspirations.

The Board succinctly restated its approach to bargaining unit determination in the following passage at paragraph 23:

... We are troubled by the fact that a largely administrative and policy-laden determination has mushroomed in some cases into an elaborate, expensive, and time-consuming process for deciding a relatively simple question: does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer.

Should the unit requested by the applicant satisfy this standard, the unit will be granted by the Board. It is unnecessary to consider, in those circumstances, any alternative bargaining unit configuration, as the Board's function is to determine only whether the unit requested by the applicant is "an" appropriate unit. Comparative assessments of possible bargaining unit descriptions are unnecessary.

28. Recent decisions of the Board have refined the approach taken by the Board in *Hospital for Sick Children*. In *The Governing Council of the Salvation Army in Canada and Bermuda* [1994] OLRB Rep. January 85, the Board, applying the principles set out in *Hospital for Sick Children*, *supra*, observed that a trade union need not seek to represent the most comprehensive bargaining unit, noting that as the applicant the union has a degree of flexibility in deciding what unit to organize. At the same time, the Board went on to note that should the union decide to organize a more comprehensive unit, such unit will usually be appropriate, and will likely be

accepted on the basis of the test outlined in *Hospital for Sick Children*, unless serious labour relations problems are demonstrated which supplant the Board's concerns regarding fragmentation or which reflect an idiosyncratic or perverse unit.

29. Most recently, in *Burns International Security Services Limited* (unreported, April 7, 1994, Board File 3340-93-R) [now reported at [1994] OLRB Rep. Apr. 347], the Board addressed the utility of the concept of "community of interest". In this decision, it was noted that the term "community of interest" does not usually provide the Board with much assistance in determining whether an applied for bargaining unit is appropriate. It was observed in this decision that the focus before the Board in bargaining unit determination cases should be upon "concrete problems rather than the sometimes nebulous concept of 'community of interest'". After citing a passage from *Homewood Health Centre* [1992] OLRB Rep. Feb. 181, in which *Hospital for Sick Children* is once again referred to, the Board observes as follows at paragraph 30:

These passages suggest a more flexible approach, focusing on the problems caused or averted by particular bargaining unit configurations, rather than so-called Board policies that may or may not reflect current labour relations realities. This is not to say that history or existing practices are irrelevant. History can be a useful guideline to what is appropriate because established practice may reveal what works and what does not. And, of course, there is some virtue in certainty and simplicity - hence the Board's inclination to define bargaining units with respect to the geographic municipality in which the employer operates. But as the practice in the security industry amply illustrates: multiple locations, or even multiple municipalities may also be appropriate bargaining units.

30. This panel of the Board agrees with the approach to the concept of "community of interest" which is reflected by the decision of *Burns International Security Services Limited*, described above. In the case before us, we found the numerous references to "community of interest" to be unhelpful. As noted by the Board in *Burns International Security Services Limited*, all employees share a "community of interest" by virtue of working for the same employer. In point of fact, there are numerous "communities of interest" that can be identified in any particular workplace. It is not necessary nor is it desirable for the Board to assess the relative strengths of the varied "communities of interest" in the workplace, just as it is unnecessary for the Board to consider alternative bargaining unit descriptions in the absence of serious labour relations problems. At the end of the day, the Board's focus should be upon the concrete, demonstrable problems which will result from the applicant's proposed bargaining unit should it be granted by the Board. In the absence of such concrete, demonstrable problems, the applicant's proposed bargaining unit will be acceptable to the Board.

31. Applying the above approach to the case at hand, we are of the view that the responding party has adduced no concrete, demonstrable evidence of serious labour relations problems should the applicant's proposed bargaining unit be accepted by the Board. There were three particular individuals who the responding party submitted ought to be included in the bargaining unit - Eva DeSantis, Receptionist, Rob DeAngelis, Engineering Technician, and Jennifer Carpenter, Machine Operator/Scheduling Clerk. The Board heard no testimony from Ms. DeSantis, and the employer conceded her "office and clerical" characterization. Likewise, the employer conceded Mr. DeAngelis' technical status. The position of the employer was that Mr. DeAngelis was properly included in the unit because his position shared "a greater community of interest" with the production employees contained in the applicant's proposed bargaining unit. For the reasons described above such an assertion is unhelpful and not an inquiry that the Board need embark upon. Having considered the evidence regarding Mr. DeAngelis, we are not satisfied that the employer has demonstrated serious labour relations consequences should the Engineering Technician be excluded from collective bargaining. Although Mr. DeAngelis has participated in the production of product, any difficulties created by such minimum involvement are capable of being

dealt with by the parties. With respect to Ms. DeSantis, the employer's position was that there was some likelihood that she would be the sole employee excluded from collective bargaining. In light of our ruling on the position of Engineering Technician, that possibility is now unrealized and there is no evidence to suggest that serious labour relations problems would otherwise result from the exclusion of the receptionist from the bargaining unit.

32. With respect to Ms. Carpenter, a great deal of evidence was led regarding her job duties and responsibilities, and where her "communities of interest" lie. Again, in our view this evidence was largely unhelpful. It is clear that Ms. Carpenter has, since her hiring in August, 1993, worked as a Machine Operator. In mid-February, 1994, she was temporarily assigned to a Scheduling Clerk position which caused her to spend much of her time in the office area, though parts of her shift are spent on the floor, either in the warehouse or filling in as a relief worker. She also has worked on the weekends as a Machine Operator. This temporary assignment was scheduled to end effective April 15, 1994, at which time she was to return to the plant as a Machine Operator. As at the date of this application, February 28, 1994, Ms. Carpenter was working in the capacity of a Scheduling Clerk.

33. The issue as it relates to Ms. Carpenter, therefore, is the narrow one of whether Ms. Carpenter is an employee for the purposes of the count - i.e. whether she is properly characterized as an "office, clerical, technical or sales" employee or whether she is a "production" employee. The concept of "community of interest" has no relevance here, as the determination is a straight, factual one as to whether in substance, as at the date of application, Ms. Carpenter worked in the office or in the plant as a Machine Operator. We are of the view that as at the date of application Ms. Carpenter is properly characterized as a Machine Operator. It is true that she was at that time formally filling a Scheduling Clerk position. However, her appointment to that position was temporary, until a particular customer's improvement program was completed, and had a fixed date of termination. In light of that evidence, we are of the view that, on the particular facts of this case, as at the application date Ms. Carpenter was properly described as a production employee and therefore should be considered an employee for the purposes of the count.

34. It is for these reasons that we ruled as we did on April 7, 1994.

DECISION OF BOARD MEMBER B. L. ARMSTRONG; June 1, 1994

I dissent regarding the status of Jennifer Carpenter.

2339-93-U Mirza Alam, Brian Ames, Mahmood Ansari, Mohd Aslam, Bruce Boulton, Robert Campbell, Ashton Caspersz, Jana Cibulka, Ed Foden, Arthur Gleghorn, Nikolas Ilkos, Joe Karol, Steve Kirilovic, Anthony Korsman, Shu-Tak Kwan, Fred La Roche, Mahendar Makim, Carolyn Oaks, Raj Puri, Vince Risi, Phil Russell, Danny Samson, Frank Sindelar, Hank Teeuwissen, Stan Trakalo, Bill Tyndall and Michael Wong, Applicants v. Power Workers' Union - CUPE Local 1000, Responding Party v. Ontario Hydro, Intervenor

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Applicants asserting that decision not to take their job posting grievance to arbitration violating union's duty of fair representation - Board declining to inquire into application having regard to delay in filing it, previous parallel proceeding, likelihood of success, nature and utility of any remedy that might flow, cost implications, passage of time from critical events, and shifting labour relations situation - Application dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *H. Kopyto* for the applicants; *Chris Dassios* and *Dan Heffernan* for the responding party; *David Akande* and *Kerri Whyte* for the intervenor.

DECISION OF THE BOARD; June 28, 1994

I

1. The name of the responding party is amended to read: "Power Workers' Union - CUPE Local 1000".

2. This is a complaint under section 91 of the *Labour Relations Act*. The complainants contend that the respondent union has contravened section 69 of the Act. That section reads as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

The complainants assert that the union breached its section 69 duty, when the union decided not to take their grievance to arbitration.

3. Section 69 concerns the way in which a trade union is required to represent the employees for whom it is the bargaining agent. Section 69 imposes no obligation upon an employer. Nor can an employer contravene section 69. Nevertheless, Ontario Hydro is an "intervenor" in this proceeding, because it may be affected by the remedy which the complainants seek.

4. A hearing in this matter was held in Toronto, on March 24, 1994. The purpose of that hearing was to receive the parties' representations on what the union and Ontario Hydro described as a "preliminary issue": whether the Board should exercise its discretion to inquire into this complaint, having regard to its timing, the remedy requested, and the decision in an earlier Board proceeding arising from the same circumstances (Board File No. 3400-92-U, decision released December 10, 1993).

5. In order to understand what this complaint is about and why the union and Hydro object to proceeding, it is necessary to sketch in some background.

6. Most of this background is not in dispute.

II

7. The 27 complainants are employees (or former employees) of Ontario Hydro. They are (or were) part of a bargaining unit that encompasses many thousands of employees across Ontario. Their terms and conditions of employment are prescribed in a negotiated collective agreement.

8. In early 1990, Hydro had 11 job openings for a position described as “Design Draftsperson, Electrical Grade 64”. These job vacancies were posted so that employees interested in promotion or transfer could make application. There were 79 such applicants. The 27 complainants were among them. However, the complainants were not among the 11 employees eventually selected to fill these positions.

9. The vacancies in question were considered to be “supervisory positions”. The filling of “supervisory positions” is governed by article 10 of the collective agreement:

In filling vacancies and making transfers, or promotions among employees represented by the Union, Ontario Hydro will take into consideration whether the position is supervisory or non-supervisory and the following procedure will apply.

(a) Supervisory Positions

- (1) In considering applications for supervisor positions, primary consideration should not be given to seniority, but to personal qualities such as leadership, reliability, judgment, ability to organize and instruct and an understanding and a display of the practice of good human relations. For supervisory positions, an endeavour will be made to promote the most promising employees.
- (2) Only those possessing these characteristics should be considered. Where practicable, applicants for supervisor positions should be interviewed by the supervisor responsible for the selection. Only in cases where there does not appear in Ontario Hydro's opinion, to be much difference in qualifications will seniority govern.

10. The collective agreement provides that seniority should not be given primary consideration when the employer is choosing supervisors. The determination is to be based upon the employer's assessment of an individual's “personal qualities”. Seniority governs only where, *in Hydro's opinion* there is not much difference in qualifications.

11. This clause has been in the parties' collective agreement for many years, and has been the subject of several arbitration proceedings. In each of these cases the union has challenged the employer's selection, asserting that the senior candidate was more qualified, or at least *as qualified* as the individual selected. In each case the union argued that the senior employee should have been given the job. And in each case the union was ultimately unable to reverse management's decision.

12. Arbitrators have consistently held that, under article 10, Hydro has a “wide leeway” in choosing among applicants for a supervisory position, and that seniority is to be a subordinate factor, relevant only when *in the opinion of the employer*, the candidates were relatively equal. Arbi-

trators have held that the employer is entitled to make an essentially subjective assessment of the candidates' personal qualities. For as arbitrator K. P. Swan commented:

The emphasis on the amorphous personal qualities set out in article 10.2(a) and the consignment of a substantial discretion to management to determine which candidates possess those qualities and in what relative quantity, is part of the bargain made between the parties. All that we are entitled to do is to assess a particular promotion competition against those standards and determine whether, on the balance of probabilities, the union has made out a case that a particular promotion decision was contrary to the collective agreement.

13. As long as Hydro had a reasonable basis for its decision, arbitrators were not inclined to intervene; moreover, the employer was entitled to put its own weighting on the relevant importance of the specified selection criteria. In the circumstances, arbitrator H. D. Brown observed:

It must be recognized that it is difficult for an employee who applies for a supervisory position to establish that the management has acted incorrectly in applying the subjective criteria set out in Article 10.2 and thereby violated that Article so as to support his claim as against those of other applicants for that position. The burden on such an employee is substantial, and it is not sufficient for a Board of arbitration to conclude that it would have made a different decision from that made by management, but rather, in view of the discretion left with management in the determination of the difference in qualifications among applicants, providing that decision is reasonably based, the Board is not empowered to substitute its decision for that of the Company where management is given the discretion based on its "opinion".

(See generally the decisions of arbitrators Adel, McCamus, Swinton, Brown and Swan, dated respectively, February 14, 1979, August 7, 1979, September 1, 1982, April 30, 1983, and March 29, 1984.)

14. In summary, then, union challenges to the application of article 10 have been singularly unsuccessful. The scope of the arbitral review is limited; and, given the way in which article 10 is framed, it has been exceedingly difficult to challenge the employer's subjective judgment.

15. For completeness I should note that in one instance where an employer error was found, the arbitrator was still not prepared to give the grievor the job. The arbitrator held that to give the job to the grieving employee would "derogate from the rights of other employees who entered into the competition in good faith, and who ought not to be deprived of a fair chance for promotion simply by reason of the employer's improper treatment of the grievor". Nor was the arbitrator prepared to direct the employer to re-run a competition that had been completed several years before. The arbitrator indicated that this might have been an appropriate remedy if the error had been established earlier, however by the time the Award was made, it was simply too late for that. Accordingly, even a successful challenge to the selection process turned out to be a Pyrrhic victory.

16. This was the legal/contractual framework in place in 1990, at the time of the postings for the job of "design draftsman".

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17. According to Hydro, the job competition for the "design draftsman" involved a number of steps: a review of the candidates' applications and resumes; a test to evaluate the candidates' technical knowledge and supervisory/coaching skills; personal interviews with those whom Hydro considered to be the "top rated" candidates; and work checks with supervisors. Hydro indicates that its initial intention was to interview only the top 21 candidates; however, after the written test was administered, Hydro also decided to interview a number of senior candidates with lower scores.

18. Some 79 employees applied for the eleven posted vacancies. Seventy candidates were given the written test. Thirty-one candidates were interviewed and ranked, following a work check with their supervisors. The eleven successful candidates were chosen from this group of thirty-one.

19. The persons chosen were not the most senior applicants. They were the individuals who, in Hydro's opinion, were the most suitable for the posted vacancies. And, of course, there were quite a number of unsuccessful applicants.

20. Following the job competition the union filed "group grievances" on behalf of the group of unsuccessful candidates [Union's Book of Documents - Tab 8-11]. These grievances challenged the form of notice, the testing process, the test weighting, the exclusion of certain candidates from writing the test, and the lack of experience of some of the decision-makers. The union asserted that a number of employees were both qualified for the job and more senior than those selected.

21. These challenges were similar to those that the union had mounted (albeit unsuccessfully) in the earlier arbitration proceedings.

22. The group grievances were processed through several steps of the grievance procedure. Ultimately, though, the executive committee of the union decided not to proceed to arbitration. Its stated reasons for withdrawing the grievances, are outlined in a letter from G. H. Holland, Senior Collective Agreement and Grievance Officer, to Cal Carter, Chief Union Steward, dated October 7, 1992 [Union's Book of Documents - Tab 13]:

You have asked why the Executive Committee decided not to take these cases to arbitration.

My understanding is that they felt there was no chance of having more senior people actually selected to the jobs as a result of these grievances. We did win one supervisory selection arbitration a number of years ago, but only because Management argued they did not have to introduce any evidence to support their decision. We subsequently lost four or five supervisory selections in a row despite having very strong cases. As a result, we had to conclude the words in Article 10.1.3, A2 that "Seniority will govern only in cases where there does not appear, *in Ontario Hydro's opinion*, to be much difference in qualifications" were an insurmountable barrier. Hydro has only to produce some information which provides a basis for its *opinion* to succeed. Arbitrators are very reluctant to substitute their judgements for Management's in a selection case and have refused to do so in our supervisory selection arbitrations where the words clearly give a great deal of discretion to Management.

The Committee also considered the merits of proceeding on the basis that even if we could not get the grievors selected we might be able to force Management to run the selection process over again because of flaws in the process. They decided not to do so in part because it was by no means clear that we could convince an Arbitration Board that the process was so badly flawed that it should be repeated. For example, one of our complaints was that all the applicants were not interviewed. However, the clause we rely on in the Agreement says, "Where *practicable*, applicants for supervisory positions should be interviewed by the supervisor responsible for the selection." An Arbitration Board might well rule that with roughly 70 applicants it clearly would not be practical to interview all of them. Further, even if an Arbitration Board found there were some flaws there is a tendency on the part of Arbitrators to try to minimize the effect of such defects and go along with the original selection decision if they can rationalize some way of doing so. The clearest example of this was a supervisory selection arbitration where the Board found one of the two members of the selection team had a personality conflict with the grievor. The Board went on to reject the grievance since the decision of the other member of the selection team also felt the grievor should be bypassed.

The Committee also felt that the bottom line for your grievors is securing one of the positions and even if we convinced an Arbitration Board to order a new process there would be no certainty that any of the grievors would actually win a position. In other words, Management could

repeat the selection process following the directions of the Arbitration Board and reach the same or virtually the same result as they did the first time. If Management did so, there would be no chance to do anything effective about it because of the discretion that Management has with regard to supervisory selections. In the meantime, both the grievors and the people originally selected would be up in the air.

In the end, after extensive discussion, the Executive Committee concluded the grievances should not go forward to arbitration.

I hope this will allow you to explain the decision to your members. I understand that an appeal to the Executive Board has been filed, and therefore, there is no need to outline that procedure.

23. On November 30, 1992, the decision of the Union's Executive Committee was confirmed by the Union's full Executive Board.

III

24. The complainants assert that the union's decision not to take the group grievance to arbitration contravenes section 69 of the Act. In their submission, the union was required to assess the merits of their claims *on an individual basis*; and if it had done that, it would have discovered (so the complainants assert) that each of them is *substantially more qualified* than the employees that Hydro selected to fill the vacancies. In the alternative, the complainants contend that they are at least *as qualified* as the successful candidates, and that therefore their seniority should have been the governing factor.

25. The complainants do not accept the union's reasons for refusing to take their case to arbitration (which they characterize as insubstantial, spurious, inappropriate, etc.). The complainants assert that there were serious irregularities in the job selection process.

26. The complaint also includes this allegation:

10. The Applicants further state and rely on the fact that the majority of them are members of ethnic or racial minorities and that, where this is the case, they further rely on the fact that the decision not to accept them for the vacant job openings resulted, at least in part, from systemic and institutional discrimination against them within Ontario Hydro. The Respondent knew or ought to have known that this was an additional factor in their refusal for the vacant job openings and by its conduct as set forth herein, condoned and rationalized such practice by Ontario Hydro in further breach of its duty to the Applicants.

27. This allegation of "systemic" or "institutional" discrimination is an additional ground relied upon by those complainants who are members of racial minorities. As I understand it, the allegation *against the union* is that, over the years, it has been complicit in condoning an environment which has either poisoned the selection process or prejudiced the minority complainants' ability to succeed.

28. I emphasize the phrase "against the union" because, of course, it was *Hydro* that made the decision that the complainants challenge, and it is evident that the complainants could not all have been successful. Moreover, this is a complaint against *the union*. Hydro cannot contravene section 69.

29. I do not know how many of the complainants come from visible or ethnic minorities. Nor do I know how many of the 79 applicants or the 11 successful applicants come from visible or ethnic minorities.

30. The union's reply includes the following submissions:

7. In deciding not to proceed to arbitration the Executive Committee and thereafter the Executive Board of the Union considered the language of the collective agreement at Article 10.2 with regard to supervisory selection, which Article specifically recognizes the discretion of Ontario Hydro. Further the Executive Committee and thereafter the Executive Board considered that in supervisory selection grievances which had been taken to arbitration the Union had won one case in 1978 when the employer failed to call evidence (CWS-131) but had thereafter lost four supervisory selection grievances: O-284 (August 7, 1979), O-299 (September 1, 19982) [sic], WS-487 (April 30, 1983) and WS-106 (March 29, 1984).
8. The Union denies that its decision not to take the grievances forward to arbitration was in any way arbitrary, discriminatory or in bad faith but was a reasonable decision in face of the language of the collective agreement and the history of arbitration awards between the Union and Ontario Hydro concerning supervisory selection grievances.
9. The applicants were content to have their cases dealt with on a group grievance basis. The Union did an investigation and took into account all facts presented by the applicants in determining that the grievances were not likely to succeed. The Union could see no serious flaws in the selection process and could find no reasonable evidence to support the grievances, given the subjective test contained in Article 10.2 of the collective agreement.
10. As regards the allegations contained in paragraph 10 of Appendix "A" [systemic discrimination] to the complaint, the applicants do not even suggest that they ever raised the issue of discrimination with the Union. In any event, the Union was aware that the process used by Ontario Hydro in this selection had been vetted by an industrial psychologist, Roland Mallett and took this into account in analyzing the grievances.
11. The Union sought out any information that might have been able to found a complaint regarding the selection process being tainted by racial discrimination. It could obtain none.
12. The Union has in the past consistently put pressure on Ontario Hydro to make better efforts towards eliminating discrimination in the workplace.
13. The Union did not act in a discriminatory fashion in respect of any of these applicants as it investigated fully the allegations raised and honestly came to the conclusion that this selection could not be successfully challenged at arbitration.

31. The union's reply repeats the explanation given to Cal Carter, its Chief Steward, in October 1992.

32. The union asserts that its position has been consistent since 1992, and is based upon its assessment of the overall circumstances, and its arbitral experience in the 1980's. In the union's submission it withdrew the group grievances because: it did not think it could win; it did not think it could successfully obtain jobs for the grieving employees (senior, minority or otherwise); it did not think it could unravel a selection process completed in 1990; and it therefore saw little practical utility in a time consuming and expensive litigation process.

33. I note, parenthetically, that each of the above-mentioned unsuccessful arbitration cases, involved a single individual, and generally took a couple of days to litigate. It is impossible to predict how long the group grievances would have taken to litigate or when that arbitration proceeding might be completed. It is clear, though, that any arbitration proceedings were likely to be protracted and costly.

IV

34. This is not the first time that the union's decision to withdraw these group grievances has been challenged at the Board. On the contrary. On February 19th, 1993, Anwar Chaudri filed a similar complaint alleging that the withdrawal of the group grievances was a breach of section 69 of the Act. Like the complainants, Mr. Chaudri was an unsuccessful job applicant who thinks that one of the jobs should have been given to him.

35. Mr. Chaudri was represented by Harry Kopyto, the agent for the complainants in the instant case, and Mr. Chaudri's allegations were very similar to those raised by the complainants in this proceeding. There, as here, Mr. Chaudri claimed that he was more qualified than the persons selected, and that the selection process was flawed. There, as here, there was an assertion that the union was obliged to conduct an individualized assessment of Mr. Chaudri's qualifications in relation to the other job applicants. There, as here, there was a claim of invidious or systemic discrimination - although I am told that this was not a dominant theme in the earlier case.

36. The Chaudri complaint came on for hearing before the Board, (differently constituted) for three days, in June and July, 1993. The decision of the Board was released on December 10, 1993.

37. After considering the evidence and representations before it, the Board dismissed the Chaudri complaint. The Board found that, in all the circumstances, the union's decision to withdraw the group grievances was not a breach of section 69 of the Act.

38. The Board decision of December 10, 1993 includes the following analysis of the case:

6. The applicant's position is two-fold. First, he claims that Ontario Hydro applied the wrong provision in the collective agreement to the selection process, and that the union breached section 69 by not pursuing this issue to arbitration. Second, Mr. Chaudri claims that regardless of the criteria applied he was substantially more qualified than the successful candidates and senior to all but two. This information having been known to the union, Mr. Chaudri says, it breached section 69 by failing to form an opinion as to whether there was "much difference" between himself and the successful candidates.

Issue No. 1 - The Application of Article 10.1.3Ab

7. The provision applied to the selection process was the following:

10.1.3

In filling vacancies within the CUPE Local 1000 bargaining unit, Ontario Hydro will take into consideration whether the vacant position is supervisory or non-supervisory.

The following will apply:

A. Supervisory Positions

1. In considering applicants for supervisory positions, *primary consideration should not be given to seniority but to personal qualities such as leadership, reliability, judgement, ability to organize and instruct and an understanding and a display of the practice of good human relations*. For supervisory positions, an endeavour will be made to select the most promising candidate.
2. Only those individuals satisfactorily possessing the above characteristics, as assessed by Ontario Hydro, should be considered. Where practicable, applicants for supervisory positions should be interviewed by the supervisor responsible for the selection.

Seniority will govern only in cases where there does not appear, in Ontario Hydro's opinion, to be much difference in qualifications. (emphasis added)

Article 10.1.3A deals with supervisory positions and emphasizes "personal qualities" rather than seniority. Mr. Chaudri says that the Design Draftsperson position is non-supervisory and, accordingly, the company should have applied Article 10.1.3B, which requires it to take the most senior employee from among the qualified applicants.

8. Strictly speaking, whether or not the Design Draftsperson position is supervisory within the meaning of Article 10 is not the issue before the Board. The issue is whether the union breached section 69 by not pursuing the grievances to arbitration. To the extent, however, that the supervisory nature of the position was central to the union's thinking, it must be addressed by the Board.

9. The Job Identification Data for the Design Draftsperson position indicates that the number of employees supervised directly is "up to six". Under "Responsibility for Supervision" the document states: "requires assigning, providing advice and checking the work of members of the group". This may be contrasted with the Job Identification Data for Mr. Chaudri's current position which indicates the number supervised to be "0" and describes responsibility for supervision as: "may on occasions require showing others how to perform tasks or duties". These documents bear out the verbal evidence given by Mr. Chaudri, Cal Carter, the chief steward who initiated the grievances and another unsuccessful candidate, and Eric Eissler, Mr. Chaudri's former Supervising Group Leader. Each of these individuals indicated that the degree of supervision in the Design Draftsperson position was "small", but none suggested that it was entirely lacking. In addition, Mr. Carter acknowledged that at Grade 64 the Design Draftsperson position was the "highest level of union supervisory position within the company". In this context, Mr. Chaudri's evidence that he is currently performing the same supervisory functions as Senior Draftsperson is equally consistent with the interpretation that his current tasks may be considered supervisory or that he is working beyond his job document.

10. More important in the present context, however, is the evidence that the Design Draftsperson position is assigned "degree 3" for the purposes of pay, with degree referring to the level of supervision. Mr. Chaudri's current position is assigned degree "0", while the Supervising Group Leader position is designated degree "6". Mr. Jim Zafiropoulous, the union's second Vice-President and a member of the Executive Committee and Executive Board that considered the grievances, testified that to have taken to arbitration the position advanced by Mr. Chaudri could have resulted in the pay level being driven down two grades. This, according to Mr. Zafiropoulous, would have been contrary to the efforts made by the union to have the position rated degree 3 and would not have been in the interests of the bargaining unit as a whole.

11. On the basis of this evidence, the Board is satisfied that the union's decision not to press the "non-supervisory" arguments to arbitration was not in breach of section 69.

Issue No. 2 - The inquiry undertaken by the union

12. The essence of the second aspect of Mr. Chaudri's complaint is that the union failed to turn its mind to the issue of whether there was "much difference" between himself and the successful candidates.

13. Mr. Chaudri gave considerable evidence as to his own qualifications for the position, and also as to a corresponding lack of qualifications on the part of the successful candidates. This evidence appeared to have been intended to demonstrate that the union's decision not to proceed to arbitration could only have resulted from a failure to properly turn its mind to the issues involved. Mr. Chaudri's view of his own qualifications, however, differed from those of Hydro which ranked him in the average category in seven of the eleven assessment criteria employed and below average in two. Consistent with Article 10.1.3A, many of these criteria were of a "subjective" non-technical nature. Mr. Chaudri also referred to certain conflicts he had had in the past with Mr. Fred Wood, the Chief Draftsperson, who was a member of the selection committee. Mr. Chaudri says that these conflicts resulted in a bias against him. (These and other concerns apparently resulted in a human rights investigation by the company into the management practices in the Design Office. The complaint appears to have been supported by the

investigation but its relationship to the competition was unclear from the evidence.) Mr. Chaudri testified that he gave all of this information to the union as part of the grievance process.

14. Apart from Mr. Chaudri's allegations concerning a lack of qualifications on the part of the successful candidates, much of this evidence was undisputed. Mr. Chaudri's portrayal of his own qualifications was essentially confirmed by Mr. Eissler, who had recommended him for a promotion to Design Draftsperson in 1987 or 1988. Mr. Eissler was also aware of Mr. Chaudri's problems with Mr. Wood, but described them as being very early on in Mr. Chaudri's employment.

15. On behalf of the union, Mr. Zafiropoulos testified that nothing presented at the hearing was new to him. The importance of Mr. Chaudri's qualifications and seniority were impressed upon Mr. Zafiropoulos over the course of several conversations throughout the grievance process. Mr. Zafiropoulos also acknowledged that the union had no independent method of determining the relative qualifications of the successful and unsuccessful candidates. He explained the union's approach, however, in a number of ways. First, he indicated that as part of the grievance process the union requested and obtained information from the company and the grievors as to the manner in which the selections were conducted, including the nature of the test and the matters covered in the interviews. The union could find nothing improper. As the grievances dragged on, Mr. Zafiropoulos also requested that Mr. Chaudri provide him with the results of the internal human rights investigation. Mr. Chaudri refused to comply.

16. Second, Mr. Zafiropoulos was familiar with at least four arbitration awards which hold that Article 10.1.3A gives the company a "wide leeway" in selecting the successful candidates. The awards also establish that management's decisions will not be overturned provided it has a "reasonable basis" for a belief that there is a "significant difference" between the successful and unsuccessful candidates. The union's only success under this provision came when the company refused to call *any* evidence, arguing instead that its discretion was "virtually total". Some of these grievances had been filed by Mr. Zafiropoulos, who believed at the time that the grievors' cases were strong ones.

17. Third, apart from Mr. Chaudri's own opinion, Mr. Zafiropoulos had nothing to suggest that the successful candidates were not much more qualified for the job. Mr. Eissler's evidence did not go this far.

The Board then concluded:

18. Weighing all of these factors, together with the financial costs involved, the possibility that success on the grievances might only mean a re-run of the competition with a potential for the same outcome some years after the fact, the interests of the successful incumbents, and the union's ongoing relationship with the company, the union decided that it would not be in the interests of the bargaining unit as a whole to pursue the grievances to arbitration.

19. In evaluating the union's conduct against the duty imposed by section 69, the Board must bear in mind that section 69 "does not require that a trade union champion every employee grievance or complaint", but only that it "put its mind to the issues involved and make a good faith decision as to whether or not a matter is worthy of pursuing": *Boise Cascade Canada Ltd.*, [1982] OLRB Rep. July 981. In fleshing out these obligations in the present context, the Board is aware of the fact that posting grievances are among the most difficult for a union to manage. Unlike "standard" discharge grievances, posting grievances require the union to broker a variety of competing interests, including those of the grievors' and the successful candidates. The extent to which a union will be able to "mediate" a particular result will depend upon a good faith assessment of these factors in light of the particular collective agreement provision in issue.

20. Having regard to the evidence of Mr. Zafiropoulos, the Board is satisfied that the union complied with the duty imposed by section 69. *The evidence is that through first hand experience Mr. Zafiropoulos was intimately acquainted with the issues and risks involved, including those which extended beyond the interests of Mr. Chaudri and the other unsuccessful candidates. While the union may not have undertaken an individual assessment of the merits of Mr. Chaudri's case against each of the successful candidates, section 69 ought not to be construed as requiring the union to "re-run" the competition, especially where the collective agreement makes clear that it is*

management's "opinion" that governs on a variety of essentially subjective criteria. For the purposes of section 69, it is enough that the union turned its mind to Mr. Chaudri's case and made a good faith assessment of the issues and risks involved before deciding not to pursue the grievances further.

22. The application is dismissed.

[emphasis added]

39. As will be seen, the Board reviewed the union's reasons for withdrawing the group grievances and concluded that there was nothing improper about the way in which the union made that decision. It was not "arbitrary", "discriminatory" or "bad faith" for the union to evaluate the group grievance on a generalized basis, taking into account the various factors, risks, and potential outcomes mentioned in the Board's decision. Likewise, it was not arbitrary, discriminatory or bad faith for the union to conclude that, all things considered, it was not worthwhile pursuing the group grievances to arbitration. The union was not obliged (notionally) to "rerun" the competition or make individualized assessments of the merits of each unsuccessful applicant's claim in relation to the successful applicants and each other. The union was entitled to assess the group grievances on the basis of general considerations, and to conclude, on balance, that litigation would not be a worthwhile exercise.

40. As of March 24, 1994, the date of the hearing before me, there had been no request to reconsider, vary or revoke the Board decision of December 10, 1993.

V

41. The instant complaint was filed on October 13, 1993 - 8 months after the Chaudri complaint, almost a year after the grievances were withdrawn, and three years after the job competition in which the complainants were unsuccessful. As in the Chaudri case, the complainants are unsuccessful job applicants who challenge the union's decision to withdraw their "group" grievances. They are members of the same "group" as Mr. Chaudri.

VI

42. Hydro denies that there was any error in its assessment of the complainants' abilities relative to others, or any breach of the collective agreement back in 1990 (the collective agreement then in effect has long since expired). Hydro points out that *it* cannot breach section 69 and no other section is cited, nor are its actions properly subject to review by the Board. Hydro also denies any impropriety or "systemic discrimination", and points out further that there are no particulars whatsoever, despite the Board's Rules requiring specific pleadings. In Hydro's submission, there is nothing but a "bald allegation".

43. Hydro further points out that the situation today is quite different than it was in 1990, when the job competition was conducted, or even 1992 when the grievances were withdrawn. The corporation has undertaken a massive re-organization which has affected thousands of employees. Neither the environment nor the organization are the same as they once were.

44. Hydro asserts that of the 11 successful candidates for the 1990 vacancies, eight have since left the corporation under special retirement or voluntary separation packages. The other three successful candidates remain as design draftspersons - electrical, although they may have a somewhat different status under what counsel describes as the "new Hydro" organization.

45. Of the 27 complainants in this case, 7 have left Ontario Hydro under special retirement or voluntary separation packages. They are no longer employees in the bargaining unit.

46. Of the remaining 20 complainants, 4 were recently promoted to the position of design draftsman electrical - that is the same position and occupational code as the remaining successful candidates from 1990.

47. The other 16 complainants are senior draftsmen, but are not all under the same occupation code. Some of them have been or will be assigned to nuclear, fossil or Hydro Electric head office jobs. Others have been successful in obtaining positions at nuclear generating stations.

48. The work situation of the interested employees (job applicants, incumbents and complainants) is very different from what it was in 1990.

49. Counsel submits that in the "new Ontario Hydro" organization, no further "design draftsmen electrical" are required and since 1990 the overall complement has been significantly reduced. Persons holding this position in the "old Hydro" organization, and still on staff (a number have left) have been redistributed and reassigned along new location and organizational lines.

50. Counsel for Hydro further submits that since the 1990 job competition there has been a significant re-organization in Hydro's departmental structure, including the elimination of the central drawing production department (of approximately 400 draftsmen) which was responsible for staffing the central department and the project groups. Now, staffing is done on a decentralized basis, with each "line of business" responsible for its own staffing. Accordingly, counsel submits that any re-run of the selection process pertaining to design draftsmen positions would involve different departmental considerations and a different kind of selection team.

51. Hydro counsel submits that there were three members on the original selection team: two chief draftsmen and one human resources officer. One chief draftsman, Jim McGowin has retired. The other Fred Wood, left Ontario Hydro under the voluntary program. The human resources officer, remains employed by the corporation, but it would be difficult, at this stage, to review the selection process in 1990.

52. In summary, neither the employee complement, nor Hydro's organizational structure, nor the work distribution, nor the situation of the various complainants is the same as it was in 1990 when Hydro conducted the job competition which is the subject of collateral attack in these proceedings. The situation has changed since 1990, and the changes are ongoing.

53. I have used the phrase "collateral attack" in the preceding paragraph because it must be remembered that Hydro is not a "respondent" in these proceedings, and cannot contravene section 69 of the Act. This complaint against *the union's decision in 1992* is the vehicle by which the complainants seek redress for what they contend is a flawed selection of process undertaken by Hydro in 1990. This litigation *against the union*, is about the union's failure to pursue litigation *against Hydro*. In this sense, the present proceeding is derivative. That is why the remedies sought include a requirement that the union resurrect and litigate the grievances withdrawn in 1992.

VII

54. The union and Hydro contend that the Board should exercise its discretion *not* to inquire into this complaint, because of the complainants delay in filing it, because the substance of the complaint has already been adjudicated by another panel of the Board, and because it is simply too late, now, to try to reconstruct a competition process that was concluded four years ago (indeed, it may not be possible). In their submission, the allegations do not provide an arguable basis for liability, the arguments have been considered before, and the Board should not embark upon

an expensive and protracted proceeding which ultimately will serve no concrete labour relations purpose.

55. For its part, Hydro denies that it is a proper party to a proceeding of this kind or at this time, and questions whether the Board can or should resurrect a grievance settled under a collective agreement long since expired. Hydro denies that there was any impropriety in the way the 1990 competition was conducted; and maintains that if there was any complaint about the union's handling of the grievances it should have been raised long before October 1993. Hydro maintains that there was no "systemic" or other discrimination influencing the competition; but if the Board is disposed to hear that allegation, it should direct full particulars for what is now just a "bald allegation".

56. The union and Hydro also point out that the allegation of systemic discrimination has recently been made the subject of a complaint to the Ontario Human Rights Commission. In their submission, the Board should not abet multiple proceedings, in different forums, arising out of the same circumstances - especially where the Board itself has already examined those circumstances at a formal hearing. Likewise, they submit that members of the group covered by the group grievances should not be permitted to litigate their complainants piecemeal, waiting to see how the hearing with Mr. Chaudri went before filing their own complaint.

57. The complainants reply that they moved with reasonable dispatch (having regard to the time it took to process the grievances), that the earlier Board decision is wrongly decided and not binding upon me, that they were not parties to that proceeding, and that the Board has considerable flexibility with respect to remedy - a matter which, in any event, should be explored only after a violation has been established. That is the appropriate time to address the effect (if any) of Hydro's reorganization.

58. In the complainants' submission, the hearing in this matter need not be protracted, since much of the background (they say) is not in dispute; and if the "discrimination allegations" require amplification, that can be accomplished by a direction to provide further particulars prior to the hearing.

59. In the complainants' submission, it does not matter that they are challenging the 1990 job competition in a complaint recently filed with the Human Rights Commission. Mr. Kopyto contends that the availability of an alternative proceeding under another statute should not preclude his clients from seeking redress in a proceeding before the Board.

Decision

60. I have carefully considered both the overall labour relations context and the parties' representations.

61. I have come to the conclusion that, in all the circumstances, this is an appropriate case for the Board to exercise its discretion *not* to inquire into this particular complaint.

62. In reaching that conclusion, I have taken into account a number of things.

63. I begin with the observation that, section 69 of the Act does not require a trade union to proceed to arbitration with an employee grievance simply because the employee demands that it do so. The union is entitled to settle or withdraw such employee grievances; and when making that

decision the union may take into account the general circumstances, the cost, the likelihood of success, and so on. There is nothing unusual or improper about that. The fact that the union has decided not to take a case to arbitration does not, in itself, establish a *prima facie* case of a breach of section 69.

*

64. A “grievance” is an allegation of a breach of the collective agreement. It is relatively easy to file one. There is no cost involved, nor is there much formal paperwork. An employee need only *allege* that s/he has been dealt with contrary to the terms of the collective agreement, and the grievance procedure is triggered - whether or not there is a contractual foundation for the employee claim.

65. Once a grievance is filed most collective agreements require several steps of discussion before a matter may be referred to arbitration. The purpose of that discussion is to allow the parties to consider their positions and resolve their differences - again, whether or not there is a contractual foundation for the employee claim. In the ordinary course, one would expect that most claims would be granted, settled or withdrawn. The discussion process should reveal the relative strength of the parties’ positions, and thus, the desirability or utility of formal litigation. That is what the “grievance procedure” is for.

66. A union would be remiss in its obligations to the membership if it proceeded to litigation with claims that were unlikely to be successful. Indeed, there are good labour relations reasons for *not* doing so. In *Catherine Syme*, [1983] OLRB Rep. May 775, the Board described the situation this way:

20. Section 68 [now 69] requires a trade union to act fairly, *inter alia*, in the handling of employee grievances. But it does not require a trade union to carry any particular grievance through to arbitration simply because an employee wishes that this be done. A trade union is entitled to consider the merits of the grievance, the likelihood of its success, and the claims or interests of other individuals or groups within the bargaining unit who may be affected by the result of the arbitration. The trade union must give each grievance its honest consideration, but so long as the arbitration process involves a significant financial commitment and has ramifications beyond the individual case, a trade union is not only entitled to settle grievances, in many cases it should do so. And, as has been pointed out in a number of cases, in assessing the merits of a grievance a trade union official - especially an elected one - cannot be expected to exhibit the skills, ability, training and judgement of a lawyer.

21. Most collective agreements contain a grievance procedure to which resort must be made before a matter can proceed to arbitration. The grievance procedure involves several stages of pre-arbitration discussion in which (as in the present case) the parties seek to amicably resolve their differences. As in the ordinary civil litigation process, it may be in the interests of both parties to seek an “out of court” settlement which is more modest than either of them might have obtained had they been entirely successful before an adjudicator. A settlement is a compromise solution which avoids the costs and uncertainties of litigation, and where it appears that the claim is without legal foundation or cannot be proved it makes little sense to proceed further.

22. These considerations are equally applicable to the settlement of disputes arising out of collective agreements. But there is an important difference. Unlike most parties in civil matters, the trade union and employer are bound together in a relationship which will subsist so long as the employees continue to support the union and the employer remains in existence. That relationship, despite its adversarial aspects and legal veneer, is neither wholly adversarial nor strictly legal. It is essentially an economic partnership in which both parties must be concerned about the ongoing relationship and the equitable resolution of disputes which occasionally arise. Like a successful marriage, a productive bargaining relationship depends upon the development of a spirit of cooperation and compromise. Regardless of the arguable importance of any partic-

ular grievance, it will inevitably be only one of many which the parties will be required to resolve during the currency of their relationship; and, if either party obstinately adheres to an unreasonable position, or continually presses trivial claims, the entire settlement process could be undermined, and their long-term relationship prejudiced. It can hardly further mutual trust and respect if union and management officials are required to spend needless hours discussing inconsequential or unfounded grievances. As a practical matter, a rigid insistence on one's "strict legal rights" or an insistence on proceeding to arbitration with doubtful claims is likely to provoke a response in kind, and yield only short term gains. As a matter of good judgement, and in the interest of sound industrial relations, a trade union should make reasonable efforts to settle grievances early in the process. I do not think there is any justification for processing obviously groundless claims simply because an individual employee demands his "day in court". Such position not only represents a waste of the employees' money in counsel and other fees associated with the arbitration process, but could also prejudice the ongoing and informal resolution of disputes, short of arbitration, where there might well be some contractual basis for the union's claim.

67. The focus in *Catherine Syme*, was the settlement of doubtful claims. But the same observations apply to their withdrawal. "Fighting regardless of the odds" may have rhetorical attraction - particularly for those who do not "foot the bill". But it may not be a sensible stance for a collective bargaining agent to take.

68. No adverse inference arises from the fact that a grievance has been withdrawn. That is an everyday occurrence in the labour relations world (where, of course, the union and the employer return to the bargaining table every year or two, to re-negotiate the terms of their relationship).

69. This is not to say that section 69 can have no application to the grievance process. But in order to trigger a breach of section 69, the union's action must be:

- (a) "arbitrary" - that is flagrant, capricious or grossly negligent;
- (b) "discriminatory" - that is, based on invidious distinction without labour relations rationale; or
- (c) "in bad faith" - that is, activated by ill-will, malice, hostility or dishonesty.

Mistakes or misjudgments do not fall within the ambit of section 69 [see, for example, the comments of Vice-Chair Adams (now Adams J.) in *Re Walter Princesdomu, Ontario Hydro and CUPE Local 1000*, [1975] OLRB Rep. May 444, and compare *I.T.E. Industries*, [1980] OLRB Rep. July 1001]; and as I have already mentioned a trade union is the employees' *collective bargaining agent*. It has a wider range of concerns than a lawyer representing a client in a piece of civil litigation. On that client's instructions a lawyer may feel obliged to launch litigation regardless of the cost or the likelihood of success. A union has to consider the broader impact, and is under no such obligation.

70. There is much to be said for the union's assertion that the complainants' allegations do not make out a *prima facie* case of a breach of section 69. The withdrawal of a grievance is a normal and, in itself, neutral event. The fact that the complainants may be (or believe themselves to be) better qualified than the successful candidates does not make *the union's decision* "wrong" - let alone "arbitrary" (etc.) - and their characterization of that decision really doesn't advance the case one way or the other.

71. The question the union had to consider was not whether Hydro was right or wrong, but whether litigation was a useful exercise. The question this Board has to consider is not whether the union was right or wrong, but whether the union's decision was "arbitrary", "discriminatory" or "in bad faith".

72. Whether or not the complainants' allegations make out a "*prima facie*" case for a breach of section 69, I do not think that they have made out a *strong prima facie* case.

73. Despite the complainants' assertion to the contrary, the union's enunciated reasons for withdrawing the group grievance are entirely consistent with its section 69 duty, and with the contractual framework within which the complainants' positions would have to be assessed. The complainants may disagree with Hydro's assessment of their qualifications. They may disagree with the union's decision not to go to arbitration. But ultimately their right to challenge Hydro's assessment, and their ability to challenge it successfully, depend upon the language of the collective agreement, and, as Arbitrator Brown noted (see above) any individual challenging the employer's selection process under article 10 will encounter considerable difficulty in proving a breach of the collective agreement (the onus being on the challenger).

74. There is nothing implausible about the union's accepting this reality even if the complainants do not. This state of affairs may suggest a need to re-negotiate the contract language to limit the employer's discretion, but it also suggests that litigation may not be a particularly prudent way to spend the members' money.

75. These are all legitimate considerations for the union to take into account.

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76. It is also important not to lose sight of what is involved in this proceeding and in the selection process that was completed in 1990. The complainants delayed almost a year before filing this complaint, and in considering the effect of that delay and the general discretion under section 91, I think it is useful to bear in mind both the nature and likely outcome of the proceeding they urge upon the Board.

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77. In 1990, some 79 individuals applied for 11 vacancies. Now 27 of the 59 (or so) unsuccessful applicants challenge the union's decision in 1992 not to challenge the employer's selection in 1990.

78. Suppose the Board were to hear this complaint and find that there was some defect in the union's decision-making process in 1992. Suppose further that the Board found that the union was not simply unwise, or wrong, or insufficiently aggressive, but in breach of section 69. Suppose also that the appropriate remedy was to resurrect the grievance and direct that it be taken to arbitration under the now expired former collective agreement. What would be the likely result?

79. By definition, the 27 complainants could not all be successful in securing the jobs they sought in 1990 even if those jobs still existed (which they probably do not - see below). Even if the competition had been properly run, only 11 employees would have been selected. And to decide today who should have been chosen in 1990 would require a complex comparative evaluation, weighing the 27 complainants against each other, the other unsuccessful applicants, and the 11 successful ones in order to see whether one or more "stars" emerged, who could then attempt the "uphill battle" to which Arbitrator Brown referred. Such arbitration proceeding would necessarily be protracted and extremely problematic.

80. Nevertheless, suppose further that at the end of the day (probably *many* hearing days) the arbitrator eventually found that Hydro had erred in 1990. What would s/he do about it? It

seems to me highly probable that *the most* that an arbitrator might do is to require a re-running of the 1990 competition. But even that is problematic.

81. In *Falconbridge Nickel Mines*, [1973] 1 OR 136, the Ontario Court of Appeal held that an arbitrator had no jurisdiction to award a position to a successful grievor when there were other unsuccessful job applicants. If the selection process was defective, the arbitrator was limited to directing the employer to do it again. The arbitrator could not usurp the authority of management and make the employee selection.

82. It is difficult to see a different result in this case, where the contract language gives such weight to the employer's subjective assessment. It is doubtful whether an arbitrator could or would do more than direct a re-running of the 1990 competition - assuming that to be possible years later. As I have already noted, the one arbitrator faced with that situation declined to do even that because of the passage of time and the artificiality of the exercise and it is by no means clear that the disputed jobs even exist in the context as it was in 1990.

83. In the circumstances, it is not surprising that the union was reluctant to proceed, nor can any adverse inference be drawn from such reluctance. By the same token, the situation raises real doubts about the practical utility of embarking upon these layers of litigation.

84. If the jobs themselves would be difficult to obtain, what about a damages remedy? In my view, the same evaluation problem arises.

85. "Loss of opportunity damages" might conceivably be assessed by an arbitrator or this Board, but that too would require a complex assessment of the individuals' likelihood of success. For if an individual could not establish that more probably than not s/he would have succeeded had the selection been done properly, there would be no basis for a monetary award from an arbitrator, and no loss flowing from the union's failure to go to arbitration. In other words, one would still have to decide, what Hydro would have likely decided in 1990.

86. I do not think these remedy problems can be ignored - particularly when the complainants delayed a year before filing their complaint, and in the meantime, the Chaudri allegations have been fully litigated.

87. The allegations which the complainants raise are not new ones. They have already been considered in the Chaudri case, which involved the same circumstances and the same attack on the union's decision to withdraw the same group grievances.

88. There, as here, an unhappy member of the group sought to challenge the union's decision to withdraw these grievances. There, as here, there was an allegation that the union had contravened section 69 of the Act. There, as here, there was an assertion or undercurrent of alleged discrimination. And, in consequence, the union's decision-making process was scrutinized by the Board over the course of a three day hearing, during which the Board considered both the individual complainant's "credentials", and the union's various reasons for deciding not to proceed to arbitration with the group grievances.

89. That is what the present complainants ask the Board to do again.

90. However, in *Chaudri* the Board concluded that the union did not breach section 69 when it withdrew those grievances. Nor, in the Board's view, did the union contravene the statute

when it made a generalized determination without considering the particular circumstances of individual employees like Mr. Chaudri. The Board reviewed the nature and history of the problem, considered the language of the collective agreement, noted the past arbitral experience, and concluded that the union had reasonably assessed the situation before it, and did not act "arbitrarily" (etc.) when it decided not to pursue the group grievance to arbitration.

91. Now, strictly speaking, this earlier decision may not be binding upon me (although as of the hearing before me, three months after its release, there had been no request for reconsideration). And, strictly speaking, "*res judicata*" may not apply, because the complainants were not *nominal* parties in the earlier case (although they were part of the same "group" as Mr. Chaudri, and now make the same allegations). But the Board would be ignoring labour relations reality if it did not recognize the link between the present complaint and the earlier one - not least because the complainants waited until October, 1993 to file this complaint, which is almost a year after the union's decision, eight months after the Chaudri complaint was filed, and weeks after the completion of the hearing in the Chaudri matter.

92. There is no reason why the complainants could not have filed a more timely complaint, as Mr. Chaudri did, and if the complainants had filed in a timely way, the issues could have been considered together, rather than in the repetitive format that is now urged upon the Board. And the responding parties would have had to defend themselves once, not twice.

93. In determining what effect should be given to the one year delay, I do not think I can ignore the fact that, in the interim, a parallel complaint has been fully and unsuccessfully litigated.

94. The previous proceeding also provides some insight into what this complaint might entail.

95. Mr. Kopyto contends that the case is a simple one which would only take a day or two to litigate. He says the amount of evidence to be heard is quite limited. But that is not my assessment.

96. It seems to me much more likely that the Board would be plunged into a protracted proceeding, examining the decision-making process as the earlier panel did, in light of the personal characteristics of one or more of the complainants. For if they cannot establish that one or more of them were so obviously superior that they were bound to win at arbitration they will not be able to show that the union was wrong - let alone "arbitrary" - to withdraw the grievances.

97. That raises the difficult factual considerations to which I have already referred. If the facts are the same, there is a stronger argument that the complainants should not be able to go over the same ground as *Chaudri*. If the facts are different, the case will not be short.

98. The unparticularized allegation of "systemic discrimination" which the union "knew or ought to have known" about raises, by itself, a host of evidentiary and practical difficulties.

99. To the extent that the discrimination is "systemic" one presumes that it was pervasive and that the complainants would have known about it in 1990. It is not entirely clear from the pleadings what the union was supposed to do about it at that time or later, nor is it clear why the complainants waited years to make that allegation. However, quite apart from that, it does not appear to me that the evidence would be either short or uncontested as Mr. Kopyto claims.

100. That, too, is relevant when deciding whether to embark upon a complaint filed a year after the union decision under review, 3 years after the Hydro decision allegedly tainted by “systemic” discrimination, and after a parallel complaint has been fully litigated.

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101. The passage of time has other consequences as well.

102. The job competition that is at the heart of the complainants’ concern, took place four years ago. The union decision not to challenge the result of that competition was made in the fall of 1992. In the meantime, the organizational and labour relations environment at Hydro has undergone a significant change, both in respect of the particular job opportunities that were available in 1990, and the complainants’ personal circumstances.

103. It seems to me that, in the circumstances, it is highly artificial to embark in 1994 on litigation before the Ontario Labour Relations Board, which if successful, could result in even more protracted litigation before an arbitrator to consider what might or might not have been a breach of the collective agreement in 1990. It is equally artificial for the Board to make some assessment of what *Hydro* would/should have done in 1990, as the basis for some award of damages against the *union*. It would also be disruptive to the existing labour relations situation within the organization and existing employee relationships for those involved in the 1990 competition. (The artificiality of the exercise is underlined by the fact that the collective agreement under which the group grievance arose has long since expired and the situation of many of the affected employees has changed since 1990).

104. One simply cannot turn back the clock or ignore the passage of time, and the organizational and personnel changes which have taken place in recent years. And that, in turn, throws the additional year’s delay into sharp relief.

105. Finally, I do not think it is irrelevant that the complainants have filed a “human rights” complaint that overlaps this one.

106. This Board does not award costs (i.e. the “losing party” does not pay the expenses of the “winner”). But this does not mean that the proceedings are “free” for the parties or the public. Litigation is expensive, and these expenses may be completely unrecoverable - even by the party whose position is vindicated. These resource and cost implications are not irrelevant - particularly in light of the unsuccessful *Chaudri* complaint and the remedial difficulties to which I have already referred. Nor is it good labour relations policy to encourage dual litigation. And to the extent that this complaint has “human rights” overtones (for some but not all of the complainants) they are best pursued, if at all, in the forum specifically established to consider issues of that kind.

107. In all the circumstances of this case (including the delay in filing it, the previous parallel proceeding, the likelihood of success in this one, the nature and utility of any remedy that might flow, the cost implications, the passage of time from the critical events, the organizational and personnel changes at Hydro, and the shifting labour relations situation), I find that this is an appropriate case to exercise the Board’s discretion under section 91 not to inquire into the complaint. In

particular contexts, these various items individually, or in combination, might prompt the Board to exercise its discretion not to entertain litigation under section 91. Here, they all point in that direction.

108. The complaint is therefore dismissed.

109. Such dismissal is, of course, without prejudice to any rights which the complainants may have against any party under any other statute or in any other forum.

0147-94-G Sheet Metal Workers' International Association, Local 30, Applicant v. Chicago Blower, division of Earls court Metal, Responding Party

Discharge - Construction Industry - Construction Industry Grievance - Employer's decision to remove grievor's seniority made contrary to collective agreement requiring written notice by registered mail to return to work - Grievor subsequently incorrectly laid off - Grievance allowed - Reinstatement with compensation ordered

BEFORE: *Gail Misra*, Vice-Chair, and Board Members *W. H. Wightman* and *P. V. Grasso*.

APPEARANCES: *J. Raso*, *A. Smith*, *J. Neilsen*, and *J. Magee* for the applicant; *R. Goulart* and *P. Sklar* for the responding party.

DECISION OF THE BOARD; June 13, 1994

1. The name of the responding party is amended to read: "Chicago Blower, division of Earls court Metal".

2. This is a referral of a grievance pursuant to section 126 of the *Labour Relations Act*.

3. The grievance in question relates to the lay-off of Mr. Jim Magee from his position as a welder at Chicago Blower. The applicant alleged that Mr. Magee (hereinafter also referred to as the "grievor") was laid off out of his seniority order on December 2, 1993. On May 3, 1994, five months later, the union amended its grievance to add that Mr. Magee had been terminated without just cause.

4. Over the course of three days of hearing, the responding party called three witnesses; the applicant called no witnesses. The parties requested an oral decision from the Board, with reasons to follow. The following is the text of the oral decision which we rendered on June 2, 1994:

Having considered the agreed statement of facts, the evidence of the witnesses, the exhibits filed, and the collective agreement, the panel finds that the responding party has violated Article 11:05(c) and (d) of the collective agreement. The panel concludes that when the responding party failed to give the grievor written notice to return to work, sent by registered mail, it failed to meet the precondition for stripping Mr. Magee of his accumulated seniority rights. Mr. Magee's seniority date, prior to June 23, 1993, was March 2, 1987. The result of the responding party's decision to remove Mr. Magee's seniority as of June 23, 1993, was that the grievor was laid off from his employment on December 2, 1993. Mr. Bhagwatee Boodram, another welder in the employ of Chicago Blower, whose seniority date was January 19, 1989, was kept on. Hav-

ing found that Mr. Magee should not have had his seniority removed, it follows that Mr. Magee was incorrectly laid off from his employment on December 2, 1993.

Having determined the case on the issue of seniority, the panel declines to address the applicant's argument on discharge for just cause. We are, however, concerned with the lengthy delay on the filing of the amendment to the grievance to add the discharge allegation, and, since we heard no evidence of the reasons for the delay, would have had some difficulty in exercising our discretion to deal with the question of discharge for just cause.

The Board directs that Mr. Magee be reinstated to his employment as a welder forthwith with an effective seniority date of March 2, 1987, and that he be compensated for any lost income incurred as a result of his improper lay-off. Written reasons for our decision will follow.

The panel will remain seized of this matter as the parties have indicated they wish the Board to assist them in the determination of the amount of compensation owing to the grievor.

5. The following are our written reasons for the above oral decision. The parties indicated at the outset of the hearing that Mr. Bhagwatee Boodram, an employee whose employment may be affected by the decision reached by this Board, had been notified of these proceedings and had not indicated any interest in participating in the hearing.

6. Chicago Blower is a small company employing fourteen employees in its factory where small and large fans are produced for custom orders or through normal production.

7. The relevant Articles of the collective agreement are as follows:

ARTICLE 6 - MANAGEMENT RIGHT

- 6:01 The Union acknowledges that it is the exclusive function of the Company, subject always to the provisions of this Agreement, to hire, promote, demote, transfer, suspend, discharge or otherwise discipline any employee for cause, *provided that a claim by any employee that he has been discharged or disciplined without reasonable cause may be the subject of a grievance and dealt with as herein provided.*

ARTICLE 8 - GRIEVANCE PROCEDURE

- 8:01 It is the mutual desire of the parties hereto that complaints of any employee, of the Union, or of the Company, *the alleged circumstances of which occurred not more than 10 working days prior to this presentation*, shall be adjusted as quickly as possible in the following manner:

• • •

ARTICLE 11 - SENIORITY AND PROBATIONARY EMPLOYEES

- 11:04 In all cases of increase *or reduction of the working force the principle of seniority will apply so long as the application of this principle does not prevent the Company from maintaining a working force of employees who are qualified and willing to do the work which is available.*

- 11:05 *Seniority rights of an employee shall cease if:*

• • •

- (c) An employee is laid off and *within three (3) days after receipt of a written notice to return to work sent to him by registered mail*, fails to notify the Company of his intention to return to work.
- (d) An employee fails to report for work *within seven (7) calendar days after the*

notice to return to work has been mailed by registered mail to his last known address on the Company records.

...

[emphasis added]

8. The agreed statement of facts tendered to the Board by the parties stated that Jim Magee, the grievor, was hired by the responding party on March 2, 1987, as a welder. He was laid off on March 18, 1993. The responding party did not send Mr. Magee written notice to return to work, which notice is, pursuant to the collective agreement, to be sent by registered mail. Although the panel heard no evidence of Mr. Magee having been recalled by telephone, there was some suggestion in the agreed statement of facts that he had been recalled by telephone in the past. Mr. Magee returned to work on June 23, 1993.

9. Mr. Peter Sklar, the Operations Manager for Chicago Blower, gave extensive evidence, all of which it is unnecessary to recite since the panel reached its decision on the limited issue of the loss of seniority. It was his evidence that for some time since 1989 the company has been recalling employees from lay-off by telephoning them and asking them to return to work. The applicant union admitted it had acquiesced to this practice. However, the parties have agreed that except for Mr. Magee, the responding party has never reduced seniority as a result of an employee's failure to respond to a telephone recall. The issue of loss of seniority has therefore never arisen or been addressed by the parties.

10. The responding party maintained that the union was estopped from arguing that the employer had incorrectly stripped Mr. Magee of his seniority because it had acquiesced to the practice of telephone call recalls from lay-off. For the following reasons we cannot accept the responding party's argument of there being an estoppel in this case. Firstly, there is no evidence before us of a phone call recalling Mr. Magee. Secondly, and notwithstanding whether there was a call or not, the responding party has never stripped any other employee of his or her seniority on the basis of a failure to return from lay-off after a telephone call. To rely on an estoppel, there would need to be unambiguous consent by the union, by words or actions, that the employer could strip employees of their seniority when they failed to return to work in circumstances similar to those in this case, and the employer would have to show it had relied on the acquiescence or agreement to its detriment. On the facts before us, the union cannot be taken to have agreed to or acquiesced to this result of failure to return to work after a telephone recall, and there is no evidence of detrimental reliance. The estoppel argument therefore fails.

11. Seniority rights are an important part of a collective agreement as they may define an employee's access to vacation, scheduling, transfers and promotions, lay-off and recall. In *Tung-Sol of Canada Ltd.* (1964), 15 L.A.C. 161, Arbitrator Reville wrote the following:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

Since this early decision, there have been numerous cases which have accepted and applied the principles outlined in *Tung-Sol*.

12. This panel is of the view that the language of the collective agreement between the applicant and the responding party is clear and unequivocal about the circumstances in which an employee within the bargaining unit shall lose his or her seniority rights. Article 11:05(c), outlined above, indicates that an employee can lose all accumulated seniority if within three days of receipt of written notice, sent by registered mail, informing an employee that he or she is being recalled to work, the employee does not return to work. Mr. Magee did not receive written notice of his recall. Article 11:05(d), also outlined above, indicates that if an employee, upon receipt of written notice of recall, sent by registered mail, fails to return to work within seven days of the recall notice, he will lose all accumulated seniority. Since it is unclear when Mr. Magee was recalled, and in any event Mr. Magee did not receive any written notice, this provision has no application to his situation. On the clear language of the collective agreement, we find that the responding party breached the provisions of the collective agreement when it removed Mr. Magee's accumulated seniority up to June 23, 1993.

13. Mr. Bhagwatee Boodram, the other welder whose services were retained after the grievor's lay-off in December 1993, had a seniority date of January 19, 1989. The Board has found that Mr. Magee's seniority date should have been March 2, 1987. The responding party's evidence was that the grievor was a very good worker who had superior welding skills to Mr. Boodram and had done work in all areas of production at Chicago Blower. Having regard to Article 11:04 of the collective agreement, therefore, the grievor should not have been laid off in December 1993 as he was both the more senior welder and was qualified and willing to do the work available at that time.

14. Having decided this case on the basis of the language of the collective agreement, it is unnecessary for the panel to consider the applicant's argument that Mr. Magee was discharged without just cause, contrary to Article 6 of the collective agreement. However, as noted in our oral decision, we are concerned that the union did not allege discharge without just cause until some five months after Mr. Magee's initial lay-off. Article 8:01 of the collective agreement contemplates issues being grieved within ten days of their initial occurrence. While the *Labour Relations Act* gives boards of arbitration the power to, in their discretion, waive time limits in appropriate circumstances, it is unnecessary for this panel to do so in this case.

15. Having regard to the evidence and representations before the Board, and the Board's findings as stated above, the Board therefore:

- (a) declares that the responding party has violated the collective agreement, and in particular, Articles 11:04 and 11:05(c) and (d);
- (b) directs that Mr. Magee be reinstated to his employment as a welder forthwith, with an effective seniority date of March 2, 1987; and
- (c) directs that Mr. Magee be compensated for any lost income incurred as a result of his lay-off on December 2, 1993, and until the date of his reinstatement, subject to the normal principles of mitigation.

16. In the event that the parties cannot agree on the quantum of damages owed to Mr. Magee, this panel will remain seized of this matter.

0974-93-U Covington Clarke, Applicant v. Local 400 F.W.D. - International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO/La-Z-Boy Canada Limited, Responding Parties

Duty of Fair Representation - Practice and Procedure - Unfair Labour Practice - Applicant asserting that union's handling of grievance violating the Act - Board receiving evidence of the Applicant and then advising parties that it wished to hear their submissions - Board explaining reasons for its intervention and procedural direction - Board concluding that union did not violate the Act in respect of any of its actions - Application dismissed

BEFORE: *Robert Herman*, Vice-Chair.

APPEARANCES: *F. Mott-Trille* and *Covington Clarke* for the applicant; *Douglas Wray* and *Chris Grogan* for Local 400 F.W.D.; *P. Rusak* and *J. Spier* for La-Z-Boy Canada Limited.

DECISION OF THE BOARD; June 28, 1994

1. When initially filed, this complaint pursuant to section 91 of the Act alleged breaches by the union and the company of a number of provisions of the Act.

2. In a decision dated March 2, 1994, the Board (differently constituted) dismissed the application, except insofar as it relied upon the provisions of section 69 of the Act, and directed that the applicant file particulars of all allegations made as part of the section 69 complaint.

3. The applicant, through counsel, filed those further particulars, and the matter was relisted before me for hearing.

4. Those particulars, in their entirety, read as follows:

1. The Applicant put in the grievance on the 23rd day of February, 1993. The Applicant was laid off on the 1st day of March, 1993, despite the doctor's note and certificate for light duty. The Applicant was not given his option of choosing or selecting a job despite his seniority right. The grievance meeting took place on the 8th day of March, 1993. Mark Smith was present at which point he told the Applicant to keep quiet. The meeting was adjourned. On the 10th day of March, 1993, the Applicant asked Chris Grogan and Mark Smith about the reply and the Applicant was then advised that they did not have to reply until five days, at which time the Applicant pointed out that the contract called for a period of two days. The Applicant received a letter on the 10th day of March, 1993 dated the 11th day of March, 1993 and if this is correct, then there is another violation of step one that was not pursued in the Applicant's grievance. Clause 15:08 provides for two days and the time interval was from the 8th to the 11th of March, 1993.

2. Step two should have been on the 11th day of March, 1993 and not the 15th day of March, 1993. Clause 15:08 would be violated.

3. In step two, Mark Smith, the Applicant's union steward, was not present which would be a violation of Section 15:04. The Applicant alleges that he was pressured to give an answer without having the assistance of his shop steward. The Applicant alleges that the meeting scheduled for the 15th day of March, 1993 should have been a pre-arbitration meeting, but it was taken as step two.

4. The Applicant alleges that his shop steward, Mark Smith, was not present at the meeting of the 15th day of March, 1993.

5. The Applicant alleges that the breaches of the contract made such proceedings invalid and requests remedial relief and the Applicant alleges that the union failed to represent him prop-

erly and even when it did represent him, it did so negligently and the Applicant requests restitution for the losses incurred.

5. The complainant proceeded first. The only evidence presented was the complainant's own testimony. He called no more witnesses. After his evidence was completed, but before hearing the evidence of the union, the Board advised the parties that it wished to hear their submissions. Following are the Board's reasons for this direction.

6. The Ontario Labour Relations Board is not a court. It has neither the jurisdiction of nor the processes of the civil court system in the province, and proceedings before the Board are not characterized by many of the technical requirements of court process. The Board is an administrative tribunal, charged with the task of resolving disputes amongst parties opposite in interest, and doing so within a context of regulating labour relations within the province. While the Board fulfils its mandate by adjudicating disputes in quasi-judicial settings and fashion, the Board's primary aim remains that of promoting sound labour relations within the province.

7. Given the Board's purpose, structure and statutory underpinnings, processes or procedures appropriate in the adversarial system typical of the civil court system may not be appropriate to particular proceedings, or in particular contexts, before the Board. Thus, the Board has held that a party making a non-suit motion will not necessarily be required to elect whether it wishes to call evidence. In *Hurley Corporation*, [1992] OLRB Rep. Aug. 940, the Board wrote as follows:

4. When parties bring motions for non-suits in civil proceedings in the Province of Ontario, there is a general practice, although not inviolate, that parties bringing such motions be put to their election prior to the court entertaining the motion. See, in this respect, *Bank of Montreal v. Horan et. al.* (1986), 54 O.R. (2d) 757; *The Ontario Public Service Employees Union et. al.* (1990) 37, O.A.C. 218 (Div. Ct.). But proceedings before the Board are not identical to proceedings before the civil courts. Rules or practices that may well make sense in a civil court context do not necessarily attend in proceedings before this Board.

5. Administrative tribunals which adjudicate matters often conduct proceedings in a less formalized, less adversarial fashion than a court would. Provided it acts in a manner that is fair, and in accordance with the principles of natural justice, the courts have generally declined to insist that the tribunal follow the court models exactly. Recently, the Divisional Court in *Metropolitan Toronto v. The Joint Board et. al.* (unreported), November 19, 1991, per O'Brien J., commented on the distinction between courts and administrative tribunals in certain respects. As the court observed:

In my view the Board dealt correctly with this argument. It considered the way non-suit is normally dealt with in civil proceedings. It then noted the proceedings before it were quite different than those of a civil proceeding and that Vaughan's motion was more accurately described as a motion of early dismissal. The Board also noted that when it was satisfied (as it must have been) that the application could not possibly succeed, no matter what evidence might come forward, it could provide relief from costs of lengthy and costly proceedings.

In conclusion, I see no error in the approach or conclusions reached by the Board nor in the manner in which the Board exercised its discretion in the control of the proceedings before it.

See, in contrast, *Ontario Public Service Employees et. al.* (*supra*), at paragraphs 40 and 41.

6. The Board is satisfied that it has a discretion to decide whether or not to put a party making a motion for non-suit to its election, prior to entertaining the motion itself. Provided its discretion is exercised in a fair manner, consistent with natural justice, the Board is entitled, in given circumstances, to decline to put a party to its election. In this regard, the Board will no doubt consider all of the circumstances, including the need for fair, efficient, and expeditious proceedings before the Board. In our view, fairness and natural justice do not demand that, in every case,

the moving party must make its election. To so conclude would be to fetter our discretion, in an area where the Legislature has not indicated that the civil court rules or practices ought to apply. It would be inconsistent as well with the Board's general authority, in section 104(13) of the Act, to "determine its own practice and procedure" provided it gives full opportunity to the parties to any proceedings to present their evidence and to make their submissions.

• • •

9. In these circumstances, where it might significantly delay the resolution of matters, to the detriment of sound labour relations in the workplace, and given that the other parties did not request that the election be made, the Board decided not to require the union to elect whether it wished to call evidence before hearing its motion.

10. Our decision was context specific, based on the the circumstances and facts before us. In response to the union's request, and given the parties' positions, it appeared both fair and sensible to allow the union an opportunity to argue in essence that there was no case for it to meet, before requiring all the parties to engage in further, extensive litigation.

11. The Board might well on its own initiative adopt such an approach. (see O'Brien, J. comments in *Metropolitan Toronto*, *supra*, p.5). All parties must, of course, be treated fairly and have full opportunity to lead their evidence and make submissions. Consistent with this, however, there will be proceedings where there is no useful purpose served by requiring a party opposite in interest to lead its evidence when the evidence of the party having the onus is clearly insufficient to meet that onus. The Board might call upon the parties to make submissions or otherwise conduct the balance of the proceedings in a manner that will not unduly delay the resolution of the labour relations dispute. In such circumstances, to force all the parties to incur additional expense and delay, when there is no reasonable likelihood of success in the issue, may not be consistent with sound labour relations principles or with sound administrative tribunal practice.

And see *Kenneth Edward Homer*, [1993] OLRB Rep. May 433.

8. A party must have full and fair opportunity to make its case. This includes a reasonable opportunity to outline the facts it asserts and to make submissions. But a full opportunity does not demand that a court-like hearing be held in every case. The *Statutory Powers Procedure Act*, applicable to most types of Board proceedings, does not require that every proceeding be conducted with the full formality and requirements of a typical court trial. Neither does any principle of natural justice.

9. Here, there were a number of reasons for the Board's intervention and direction that the parties proceed to submissions forthwith. Mr. Clarke had finished testifying, and had no further witnesses he wished to call on his behalf. His evidence had been preceded by written particulars, filed in response to a direction of the Board, and those particulars set out the relevant issues and material facts of the case. Mr. Clarke's evidence was not credible in a number of areas, and it appeared extremely unlikely, from his own testimony, that the union had breached section 69 of the Act. The union indicated that it had a significant number of witnesses it would have to call, to challenge testimony given by Mr. Clarke. The proceeding would likely therefore have taken at least one more hearing day. Finally, the complainant had the onus of establishing that the union had breached the Act.

10. It was questionable whether any purpose could be served by extending the hearing further. The evidence led by Mr. Clarke appeared so wanting, that it made sense to hear submissions first, before calling on the other parties to lead their evidence, with the attendant delay, expense, and disruption. For these reasons, the Board called upon the parties to move forthwith to submissions.

11. Mr. Clarke appeared to be a sincere individual. I do not suggest that he intended to mislead the Board. However, it was apparent from his testimony that his recollections were often vague, at best. In many cases, those recollections and his evidence changed during the course of cross-examination.

12. Until the events in question, Mr. Clarke last worked for the company in late September, 1992. At that point there was an incident at work, where remarks which he felt were derogatory and harassing were made to him. He broke down as a result, and was very distraught. He was referred to a family doctor, and later sought psychiatric assistance. It was determined he was suffering from an adjustment disorder and depressive mood (the terms Mr. Clarke used in his evidence).

13. In November, 1992, while still off work, he filed a complaint with the Ontario Human Rights Commission, alleging harassment at work. He did not advise the union that he had filed this complaint.

14. He was scheduled to return to work in mid-January, 1993, but when he attended at the plant, the nurse felt that he was not yet medically ready to return. He was advised by the nurse to see to his physician again. While in the plant, he spoke to a union officer, telling him that he wanted to file a grievance. He did not however, tell the union the nature of his complaint.

15. As suggested by the company nurse, he saw his physician again, who recommended that he stay off work until the beginning of March, 1993, and Mr. Clarke followed this advise.

16. On February 23, 1993 he again came to the plant, and this time filed a grievance, with the assistance of the union, asserting a breach of the Article dealing with discrimination and harassment. Under "Statement of Grievance" on the grievance form is written the single word "harassment", and under "Relief Requested" is written the phrase "full redress". No other relevant information is set out in the grievance. Again, as in January when he spoke with a union official, Mr. Clarke did not advise the union of the nature of his complaint. Mr. Clarke testified that the union official did not ask, and Mr. Clarke did not tell him, as he wanted to see what the union would do with it, in light of the fact that Mr. Clarke had filed quite a few grievances before.

17. On March 1, 1993 Mr. Clarke returned to work, but was laid off a few days later.

18. On March 8, 1993, the first-step grievance meeting was held. Both officials of the union and the company were present. It does not appear as if either the employer or union were then aware of the details of his grievance. Mr. Clarke testified that no details of the "harassment" were discussed. He also acknowledged that both the company and the union asked him what he was complaining about, and he replied only "harassment" and that he sought "full redress". Mr. Clarke testified that he felt that this information was sufficient and that he left it to their discretion to come up with an appropriate remedy. Mr. Clarke also testified that one of the union officials at the meeting had advised him to keep quiet. In the result, Mr. Clarke did not advise either the union or the company of the details of the nature of his complaint.

19. On or about March 10, 1993, the second step of the grievance procedure was held, again with officials of both the company and the union present. The union asked Mr. Clarke what he meant by "full redress". Mr. Clarke got upset at the question, had to leave the grievance meeting, and went to the nurse's office. As his blood pressure was quite high, he ended up leaving the plant and seeking further medical attention.

20. Sometime after the grievance meeting, the company officially responded to the union,

indicating it was prepared to fund the cost of an educational program for all employees, hoping to create a change in the attitude of employees with respect to harassment of fellow employees. The company did not acknowledge that any harassment of Mr. Clarke had occurred, but they were prepared to embark upon such an educational program if the grievance was withdrawn.

21. Several days later, on March 15, 1993, another meeting was held, again with both company and union officials present. Mr. Clarke was again asked by both the union and the company what he wanted. Mr. Clarke was still shaken up at that point, so he kept quiet. At one stage during this meeting, Mr. Clarke and the union officials went outside the office, so that they could discuss matters without the company officials present. Mr. Clarke was asked by the union to indicate whatever it was he wanted, and if he wanted anything was advised that now was the time to ask for it. Mr. Clarke did not ask for anything. In Mr. Clarke's view, the meetings had not been held in conformity with the requirements of the collective agreement, particularly Articles 15.04 and 15.08, and therefore everything that was taking place was invalid.

22. The meeting reconvened. It was suggested that Mr. Clarke might better be able to write out the details of the nature of his complaint. He was given five days to do so, and to advise the company and the union by then of the nature of his complaint. The meeting ended. Mr. Clarke did not respond in writing, or otherwise, within five days. He testified that he did not do so because he was still in a mentally distressed state. Further, he wanted to give the union and the company the necessary leeway to make him a reasonable offer of compensation and redress.

23. No further meeting was held with the union after March 15, 1993. Mr. Clarke was advised that there would be a union meeting to vote on whether his grievance should go to arbitration, but he did not attend. He was also advised, after the meeting, that the union had decided that his grievance not go to arbitration.

24. Mr. Clarke has not worked since September, 1993, again because of his emotional state. His health remains shaky, and he is still seeking regular medical attention. At the time of the hearing, he was still not medically able to return to work.

25. Counsel for Mr. Clarke asserted a number of breaches of the Act. First, there had never been a genuine attempt by the union to assist Mr. Clarke with his complaint or grievance. Second, the provisions of the collective agreement (Article 15.04) sets the composition of the Grievance Committee, and subsequent articles require the presence of the Grievance Committee at certain steps of the grievance procedure. The union did not comply in all respects with these requirements.

26. Third, the union was required to give extra assistance to Mr. Clarke, as it was fully aware that he was suffering from stress related symptoms, and therefore needed more help than the average person. It was incumbent upon the union to explain procedures even more accurately and with more patience to Mr. Clarke.

27. Fourth, as part of this requirement, the union should have presented Mr. Clarke with options, rather than treating his grievance in the ordinary and customary fashion.

28. Fifth, there were no reasons given in the decision that the grievance not go to arbitration, and the union was required to do so.

29. Section 69 of the Act reads as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in

bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

30. The union did not breach section 69 in respect of any of its actions. The union processed Mr. Clarke's grievance when he filed it, and assisted him with the filing of that grievance. Union officials attended with and represented Mr. Clarke throughout the steps of the grievance procedure. The grievance which he had filed was deficient in particulars, simply indicating that he complained because of "harassment". Mr. Clarke was repeatedly asked to explain the nature of his complaint and given alternative ways of communicating. There is no evidence to suggest that anything in the manner in which he was asked was in any way harassing, intimidating, or untoward in any respect. In the face of those repeated requests by both company and union, Mr. Clarke did not respond.

31. The union did go out of its way to try to assist Mr. Clarke. When requests of Mr. Clarke to provide details orally were not successful, both the union and company agreed that Mr. Clarke should have a five-day period to write any of the details of his complaint down. He was able to do this without either union or company officials being present, and was free to obtain the assistance of anyone he chose to assist him in writing out the details. He did not respond to this offer. In essence, he did not meaningfully respond at any stage to requests for relevant information.

32. Faced with the lack of detail or substance to the grievance, and Mr. Clarke's inability to provide any of that detail, there was little more the union could have done. The union chose not to process the matter to arbitration. In the Board's view, this was a reasonable decision. Indeed, because of its obligation to all the members in the bargaining unit, it would have been imprudent had it done otherwise.

33. Mr. Clarke also argues that the provisions of the collective agreement dealing with the grievance procedure were not followed, and this failure constituted a breach of section 69. While the evidence is not clear in this respect, it may be that one of the stewards was not present for a particular step of the grievance procedure, and it may be that his/her presence is required by the collective agreement. However, the company did not rely in any way on this absence as a basis for denying the grievance. And the union still fully assisted Mr. Clarke with his grievance. Even if the collective agreement was not followed in this respect, there is nothing whatsoever to indicate that it made any difference to the complainant's grievance, or its processing by the union. To the contrary, the subsequent steps of the grievance procedure and the union's involvement in them ensured that all of Mr. Clarke's interests were fully and properly protected by the union.

34. Finally, although the particulars (paragraph 4, *supra*) note additional concerns, such as events surrounding his layoff, there was no evidence in support thereof, nor did counsel raise this concern in submissions.

35. In summary, the Board is satisfied that the union did not breach section 69 in this complaint, and it is dismissed.

3292-93-U Robert Dumeah, Applicant v. International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers Local #700, K.E.W. Steel Fabricators Ltd., Responding Parties

Construction Industry - Discharge - Duty of Fair Referral - Duty of Fair Representation - Intimidation and Coercion - Practice and Procedure - Unfair Labour Practice - Board dismissing objection to vice-chair sitting alone in this case - Applicant complaining of threats related to his participation in Board proceeding, union charges laid against the applicant, the refusal to permit the applicant to lay union charges against a fellow member, the failure to refer the applicant to work on certain project, the union's failure to assist him with certain grievances, his discharge, and being struck from the hiring hall referral list because of his improper expulsion from the union - Responding parties asking Board to dismiss application on grounds of undue delay - Board considering effect of delay in construction industry - Board dismissing all aspects of complaint for delay, except for allegation concerning removal of applicant from hiring hall list - Nine month delay in respect of referral issue not so long as to cause Board to decline to hear complaint

BEFORE: *Robert Herman*, Vice-Chair.

APPEARANCES: *Graham E. Smith*, *Robert C. Dumeah* and *Charles Wilburn* for the applicant; *A. M. Minsky* for Ironworkers and Ironworkers Local 700; *Stephen A. McArthur* and *Michael Tucsok* for K.E.W. Steel Fabricators Ltd.

DECISION OF THE BOARD; June 14, 1994

1. This is an application under section 91 of the *Labour Relations Act*, in which the applicant, Robert Dumeah, alleges that the responding unions, the International Association of Bridge, Structural and Ornamental Ironworkers and International Association of Bridge, Structural and Ornamental Ironworkers Local #700 (hereinafter, "the union", "Local 700", or "the Ironworkers") have breached sections 13, 47(2), 69, 70, 71, 82(2), and 148(2) of the Act, and that the responding company, K.E.W. Steel Fabricators Ltd. (hereinafter, "K.E.W."), has breached sections 82(1) and 148(2) of the Act. This decision considers the issue of delay in filing an unfair labour practice complaint about work in the construction industry.

2. Mr. Dumeah asserts that numerous actions constitute breaches of the Act, and these events occurred over a seven year period, the most recent taking place on March 16, 1993, or shortly thereafter. The instant complaint was filed in December, 1993. The responding parties allege that the complaint, in its entirety, is untimely as Mr. Dumeah waited too long after the events to complain to the Board, and therefore, the Board ought to dismiss the complaint on grounds of undue delay.

3. Part of the union's argument in this respect is based upon the assertion that the construction industry is "different", and accordingly the Board ought to exercise its discretion in delay issues in a manner that recognizes the construction context and the way in which the industry works.

Preliminary Matters

4. I sat alone as a single Vice-Chair hearing this matter, pursuant to the authority of the

Chair to so authorize a Vice-Chair, under to the provisions of section 104(12) of the Act. The relevant statutory language reads as follows:

104. (12) Despite subsections (9), (10) and (11), the chair may sit alone or may authorize a vice-chair to sit alone in any of the following circumstances to hear and determine a matter and to exercise all the powers of the Board when doing so:

1. In the case of a matter respecting section 11.1, 69, 70, 73.1, 73.2 or 92.1, subsection 92.2(1) or (6) or section 94, 95, 126 or 137,
 - i. if the chair considers it advisable to do so, or
 - ii. if the parties consent.
2. In the case of any other proceeding,
 - i. if the chair considers that the possibility of undue delay or other prejudice to a party makes it appropriate to do so, or
 - ii. if the parties consent.

(12.1) For the purposes of subsection (12), if the chair is absent or not able to act, the alternate chair may act in his or her stead.

5. Both the union and the Company objected to my conducting this proceeding as a Vice-Chair sitting alone, on the basis that they had not had any opportunity to have input into the Chair's decision, nor had they been provided with any information about how or why the decision was made. .

6. After hearing their submissions, I ruled that I could properly hear the complaint in the circumstances. Although not explicitly characterized as an objection going to the Board's jurisdiction, I have assumed it to be so for purposes of my decision. If the objection sought to attack the appropriateness of the decision of the Chair, it is not apparent that such assertion could be made before me, rather than to the Chair directly.

7. The statutory scheme set out in subsections 104(12) and (12.1) of the Act grants to the Chair (or Alternate Chair) a discretion in determining the composition of the Board in a particular proceeding. The exercise of this discretion is an executive act, made on a purely administrative basis.

8. The instant complaint relies upon numerous sections of the Act, which fall under different parts of section 104(12). Under section 104(12)1, applicable to proceedings brought in respect of sections 69 and 70, amongst others, the Chair is given the authority to sit a Vice-Chair alone where the Chair considers it advisable to do so, or if the parties consent. In the case of any other proceeding (section 104(12)2), the Chair's discretion can be exercised where the Chair considers that the possibility of undue delay or other prejudice to a party makes it appropriate to do so, or if the parties consent. It is common ground that the parties did not here consent.

9. There may be occasions where scheduling problems or other difficulties in constituting a tripartite panel can lead to undue delay or other prejudice to a party. One purpose of these new legislative provisions was to deal with this problem, to provide the Chair with the ability to ensure that Board hearings proceeded expeditiously, consistent with the truism that "labour relations delayed is labour relations denied". It would be inconsistent with that purpose if the Chair had to afford an opportunity to parties to a proceeding to participate in the decision as to whether a single Vice-Chair sits alone or not. Parties would have to be given adequate notice of the decision of the

Chair that she might exercise her discretion, a meaningful opportunity to participate in the process, and arguably, reasons for the Chair's eventual decision. To read the statutory scheme as requiring such a process would undermine the very purpose of the scheme. Hearings would inevitably be further delayed if the Chair considered exercising her powers to reduce delay.

10. Section 104(12)1 limits the Chair's discretion to where the "Chair considers it advisable". This is a general, unrestricted discretion which in essence depends upon the Chair's opinion. And it is only the "possibility" of undue delay or prejudice which need be present under section 104(12)2. The powers in this subsection are thus dependent, if at all, upon the opinion of the Chair as to whether a possibility of undue delay or other prejudice is present. It is the mere possibility that triggers section 104(12)2, and it is solely the Chair who is to consider this possibility.

11. When the particular language is considered, in the context of the overall scheme for constituting panels, and in light of the purpose of the Board and of section 104(12), the decision exercised by the Chair, pursuant to section 104(12), is properly characterized as purely administrative in nature. The Chair need not provide an opportunity to the parties to the proceeding to participate in this decision, nor is the Chair required to issue written reasons justifying the exercise of her discretion. To require either of these actions would effectively defeat the very purpose of the statutory amendment. Accordingly, I ruled at the hearing that the case would proceed before me.

12. The complaint as filed, including supporting documents, is approximately 150 hundred pages in length, and includes correspondence between individuals and other institutions or tribunals, and a transcript from another proceeding. In response, the union asserted that the complaint was not sufficiently focused and the union was not able to file a proper response while it remained so. It asked for further particulars and other related relief. In the result, a hearing was held to deal with the sufficiency of the particulars, and the other preliminary matters raised by the union. Those matters included the objection that the matter ought to be dismissed on a preliminary basis as it failed to disclose a *prima facie* case, and, in any event, that the complainant had delayed too long in filing the complaint. Further, as Mr. Dumeah had previously filed a complaint with the Ontario Human Rights Commission, the union and the company both asserted that the complainant had effectively elected to have his complaint against K.E.W., and against the union insofar as his employment at K.E.W. was concerned, dealt with elsewhere. They submitted Mr. Dumeah was now precluded from complaining in the instant proceeding about these same matters.

13. The Board explained to the complainant that the hearing would first consider the objection that the complaint had been filed too late, and ought to be dismissed on the grounds of delay, and then the objection that the complaint failed to disclose a *prima facie* case. The nature of both objections was explained by the Board to the complainant. The Board asked Mr. Dumeah to explain what had happened, to set out all the facts he considered relevant. The Board also explained that all facts he wished to refer to had to be stated, or he could not later rely upon them. While he was free to assert facts not set out in his written materials, and was advised to do so if he wished to rely on them, Mr. Dumeah was told that the facts should relate to the matters of which he had complained. Mr. Dumeah, through his representative, went through a description of what had occurred, and which events he asserted constituted breaches of the Act. Several times, the Board specifically asked why the filing of the complaint had been delayed. The other parties were able to agree on the facts, asserted by Mr. Dumeah, on the basis that they were so agreeing only for purposes of dealing with the preliminary objections. They do not accept that the recital of facts that follows is accurate; only that the Board can assume so for purposes of dealing with the preliminary objections.

14. When all the facts had been agreed to, for purposes of the preliminary objections, the

complainant specifically identified six sets of circumstances which he asserted constituted breaches of the Act. The matter was adjourned, on the basis that the Board would hear the submissions of the parties with respect to the delay argument at the next hearing day, and if time permitted, their submissions on whether a *prima facie* case existed.

15. There was a gap between the first and second hearing day, and during this period Mr. Dumeah filed further particulars. The responding parties objected to the attempted expansion of the proceeding through the filing of these new particulars. At the continued hearing, the Board ruled that Mr. Dumeah could rely upon the further particulars only to the extent that they related to the six matters asserted previously to be breaches of the Act. To the extent that the new particulars asserted different breaches of the Act, or material facts relevant only to those different breaches, they could not be relied upon, as it was by then too late to raise new matters.

The Facts

16. Mr. Dumeah was a properly certified ironworker who was unfortunately seriously injured on the job, on August 18, 1986. As a result, he was off work for a considerable period, and when finally able to return to work, he was not able to perform all the tasks typically required of an ironworker.

17. In early 1991, some of his fellow ironworkers were involved in a dispute with their local, Ironworkers Local 700, over the operation of the hiring hall. That dispute eventually led to the filing of a complaint before this Board (Board File No. 3051-90-U), a complaint which is still pending before the Board and which has involved dozens of days of hearing. A membership meeting of the local was held on March 5, 1991, and one of the topics of discussion was this other complaint before the Board. Mr. Dumeah openly and actively spoke on behalf of the complainants in that proceeding. One of those complainants, Graham Smith, appears in the instant proceeding as Mr. Dumeah's representative, just as Mr. Dumeah acted as Mr. Smith's principal advisor in his complaint.

18. The first of the six matters complained of by the complainant occurred, in his submission, because of his conduct at that membership meeting. Shortly after the meeting, around April 1, 1991, Mr. Dumeah, along with several others, received a letter from the union charging them with various membership infractions. Mr. Dumeah asserts here that these charges were brought against him as retaliation for his supporting his fellow ironworkers in their complaint against the local, and as such constituted a breach of section 82(2) of the Act.

19. The hearings in the other proceeding began around April 3, 1991. Those hearings continued throughout 1991. One of the hearing days was on December 5, 1991. During a break in the proceeding that day, a union official made clear to Mr. Dumeah, through remarks and threatening gestures, that Mr. Dumeah would in some manner pay for his helping those complainants in their case. These threats are the second event said to constitute a breach, again of section 82(2) of the Act.

20. Throughout 1991, Mr. Dumeah was referred to a number of jobs through the union's hiring hall. Because of his injury and continuing physical problems, he was unable to perform some of the jobs. Other referrals were of relatively limited duration.

21. In May, 1992, Mr. Dumeah went to the Local 700 offices to go through the hiring hall records. It is not clear whether he was motivated solely by concern over his referrals, or as well by concern over referrals related to Mr. Smith's complaint, in which he continued to assist. In any event, while speaking to the person in charge of the referral list for Local 700, he and that individ-

ual became agitated and got into a physical fight over access to the referral list, and over Mr. Dumeah's request that he be allowed to copy or take copies of the materials. Mr. Dumeah asserts that the union officer physically assaulted and injured him, without provocation, but that he did not assault the other person. Criminal charges were laid by Mr. Dumeah and the union official against each other. Charges were filed under the union constitution against Mr. Dumeah, but the union would not accept the charges Mr. Dumeah sought to file.

22. This is the third sequence of events said to breach the Act. Mr. Dumeah asserts that the union committed the breach by not allowing him to go through the referral list documents, or take copies of them, and by its refusal to allow Mr. Dumeah to have the union officer charged under the union's constitution.

23. The charges under the constitution against Mr. Dumeah proceeded. Around June 2, 1992, Mr. Dumeah was advised by the union of his right to attend the Executive Board meeting on June 15, 1992, at which time the charges against him would be considered, and at which time the union would provide Mr. Dumeah with an opportunity to present his side of the story. By this time, Mr. Dumeah had retained a criminal lawyer to defend him against the criminal charges laid by the union official. His counsel advised him not to attend the Executive Board meeting, so he did not.

24. During this period, the summer and early fall of 1992, Mr. Dumeah was having a problem with his job referrals and he raised his concerns with the union.

25. On September 21, 1992, Mr. Dumeah was officially expelled from the union, and his name was to be removed from the referral list. Although he had written to various union officials expressing his version of events surrounding the hiring hall fight, he had not as yet appeared in person at any meeting or hearing where the charges against him were being considered. Again, his counsel continued to advise him not to. His expulsion set in motion internal union appeals available to a member. The union advised its officials not to change in any manner referrals for Mr. Dumeah, and to continue to refer him to jobs where appropriate to do so, until his appeal was concluded.

26. In October, 1992 the criminal charges against both individuals were withdrawn by the Court, at the request of the Crown. Mr. Dumeah objected to the withdrawal of the charges he had laid against the union official.

27. In September, 1992 and following, Mr. Dumeah was referred by the hall to several short term jobs at Flint Riggers. His most recent layoff from Flint, due to shortage of work, was on October 28, 1992. Around November 16, 1992, another Flint Riggers job (the third phase) commenced. Mr. Dumeah was not referred again to Flint, but he felt he should have been. This improper referral constitutes part of the fourth matter asserted by Mr. Dumeah to be a breach of the Act. Even though he remained on the referral list following his expulsion from the union in September, 1992, he submits that his expulsion led the union not to refer him to Flint in November, 1992. Mr. Dumeah submits that the union has breached sections 69, 70, and 148(2) with respect to this referral.

28. Mr. Dumeah also raises other objections to his representation by the union with respect to his employment at Flint. He filed various grievances arising out of his work at Flint during earlier phases. The union did not assist him with any of these grievances, and Mr. Dumeah asserts this too was a breach of sections 69, 70 and 148(2) of the Act. These complaints comprise the fourth area of his concern: his non-referral to Flint for the third phase, and the union's refusal to assist him with his Flint grievances.

29. In February, 1993, Mr. Dumeah was referred to a job at K.E.W. Steel Fabricators Ltd. ("K.E.W.") the employer responding party. Shortly after he started work there, around March 1, 1993, the appeal of his expulsion was denied by the General Executive Board of the union. At this point, his name was removed from the hiring hall list. This is the fifth matter complained of by Mr. Dumeah: his removal from the list because of his expulsion from the union constitutes a breach of section 70. Mr. Dumeah immediately appealed this decision to the General Executive Council.

30. On March 16, 1993, Mr. Dumeah was discharged by K.E.W. He asserts in the instant complaint (but did not at the time of his termination) that his discharge was orchestrated by the company and the union, and constituted a breach of sections 47(2) and 69 by the union, and section 82(1) by the company. This is the sixth and final matter of which he complains.

31. On March 19, 1993, Mr. Dumeah approached the Ontario Human Rights Commission, complaining that his discharge from K.E.W. had been because of his physical disability, resulting from his workplace accident in August, 1986. The Commission conducted an informal investigation, phoning both the company and the union about Mr. Dumeah's complaint. Also on that day, March 19, 1993, Mr. Smith (Mr. Dumeah's representative in the instant proceeding) spoke directly with the President of K.E.W., and asserted on Mr. Dumeah's behalf that it was improper for the company to have used Mr. Dumeah's injuries as an excuse to remove him from the job. This conversation was followed up by a letter from Mr. Smith to the company.

32. Around June 17, 1993, Mr. Dumeah caused to be filed with the Ontario Human Rights Commission a formal complaint about his discharge, alleging that his discharge was in contravention of the Ontario Human Rights code.

33. The company was notified of the complaint, and filed its response on September 24, 1993. It was only when he received this response, Mr. Dumeah asserts, that he realized that the company and the union had somehow conspired to have him discharged, and that the union had been involved in any way in his discharge. This led to his filing the instant complaint.

34. These are the basic facts agreed to by the parties at the first hearing day, for purposes of the delay issue. When the hearing resumed the next hearing date, after dealing with a number of other matters (not here in issue), the Board heard submissions on delay from counsel for the union and counsel for the company. Those submissions addressed the significant periods of unexplained or unjustified delay.

35. After hearing the opposing parties' submissions on the delay objection, the complainant sought, over the other parties' objections, to introduce new facts explaining the delay. He asserted that on June 1, 1993, he again needed to have surgery, because of his 1986 injury, and he had to be off his legs for approximately eight weeks. Shortly thereafter, he put too much weight on his healing legs and suffered a stress fracture, with the result that he was off his legs for a further period. Practically speaking, he asserted, he was immobilized from the beginning of June, 1993 until October, 1993. He also acknowledged that he had been unavailable for work of any kind from June 1, 1993 until approximately January, 1994, shortly after the instant complaint was filed.

36. Since these additional facts do not alter the Board's decision in any respect, they have also been considered by the Board.

37. This complaint was filed on December 2, 1993. (Technically, the complaint was filed on December 17, 1993; however, the complainant attempted to file it on December 2, 1993, and the Board returned it because Mr. Dumeah had used the wrong Board Form. For purposes of this decision, the Board has treated the earlier date as the filing date.)

38. In January, 1994, the General Executive Council of the union rejected Mr. Dumeah's appeal from his expulsion. Mr. Dumeah has not been on the list or referred to a job since March, 1993.

The Decision

39. The statutory provisions relied upon by the complainant reads as follows:

13. The Board shall not certify a trade union if any employer or any employers' organization has participated in its formation or other administration or has contributed financial or other support to it or if it discriminates against any person because of any ground of discrimination prohibited by the Human Rights Code or the Canadian Charter of Rights and Freedoms.

47. (2) No trade union that is a party to a collective agreement containing a provision mentioned in clause (1) (a) shall require the employer to discharge an employee because,

- (a) the employee has been expelled or suspended from membership in the trade union; or
- (b) membership in the trade union has been denied to or withheld from the employee,

for the reason that the employee,

- (c) was or is a member of another trade union;
- (d) has engaged in activity against the trade union or on behalf of another trade union;
- (e) has engaged in reasonable dissent within the trade union;
- (f) has been discriminated against by the trade union in the application of its membership rules; or
- (g) has refused to pay initiation fees, dues or other assessments to the trade union which are unreasonable.

(3) Subsection (2) does not apply to an employee who has engaged in unlawful activity against the trade union mentioned in clause (1) (a) or an officer, official or agent thereof or whose activity against the trade union or on behalf of another trade union has been instigated or procured by the employee's employer or any person acting on the employer's behalf or whose employer or a person acting on the employer's behalf has participated in such activity or contributed financial or other support to the employee in respect of the activity.

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

70. Where, pursuant to a collective agreement, a trade union is engaged in the selection, referral, assignment, designation or scheduling of persons to employment, it shall not act in a manner that is arbitrary, discriminatory or in bad faith.

82.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;

- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary or other penalty on a person.

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

148.-(2) On and after the 30th day of April, 1978 and subject to sections 141 and 147, no person, employee, trade union, council of trade unions, affiliated bargaining agent, employee bargaining agency, employer, employers' organization, group of employers' organizations or employer bargaining agency shall bargain for, attempt to bargain for or conclude any collective agreement or other arrangement affecting employees represented by affiliated bargaining agents other than a provincial agreement as contemplated by subsection (1), and any collective agreement or other arrangement that does not comply with subsection (1) is null and void.

40. In submissions, Mr. Dumeah withdrew his assertion that section 71 had been breached.

41. This decision considers whether any or all aspects of the complaint ought to be dismissed on grounds of delay. Perhaps the classic expression of the approach the Board brings to delay issues can be found in *The Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420, where the Board wrote, in part, as follows:

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revised to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re C.G.E. 3 L.A.C. 980 (Laskin)*; and *Re Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive

enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a mechanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged statutory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or they are overriding public policy considerations, that limit should be measured in months rather than years.

42. Since *Mississauga*, there have been hundreds of opportunities for the Board to consider its approach to delay in unfair labour practices, and its application to particular facts. As the Board has gained more experience in this area, the Board has concluded that shorter periods of delay may be sufficient to lead the Board to decline to hear the merits. Our jurisprudence has come to give meaningful content to the admonition in *Mississauga* that the delay ought, generally speaking, to be measured "in months rather than years." With the current poor economic conditions, the downsizing, closings, and reduced construction that result, and in light of the absence of a general discretion to award costs, there has been and continues to be a proliferation of complaints by employees against their unions. These complaints carry with them a disruption of an ongoing collective bargaining relationship. They also place significant financial burdens on unions and employers forced to respond, and heavy burdens on the Board's publicly funded resources. The commitment of our resources here means they are unavailable elsewhere. Primarily because of the interference these complaints cause to the collective bargaining relationship, the Board has been loathe to allow unreasonably tardy complaints to proceed. In this respect, see, for example, *John Kohut*, [1991] OLRB Rep. Dec. 1367, and the cases cited therein.

43. All these disputes arise in specific contexts. The construction industry itself provides a specialized backdrop in which to assess the problems of delay. In the construction industry, as a general proposition, individual trades people work for a particular employer for only a short time, usually referred to the employer by the union, through its hiring hall. It is the transitory and temporal nature of employment, and the reality that the key employment relationship is between member and union, not employee and employer, that distinguishes construction from other types of work. A brief description of the hiring hall system is helpful. In *Ontario Hydro*, [1983] OLRB Rep. Jan. 99, the Board wrote:

32. The other approach, and the one we prefer, is to recognize that this collective agreement was negotiated in the context of the construction industry and that the words of the collective agreement in issue pertain to one of the hallmarks of the construction industry, the hiring hall. The nature of a hiring hall is to a large degree a function of two labour relations realities in the construction industry. The first is the fact that this collective agreement and others in the construction industry generally pertain to "certified tradesmen or journeymen". The word "journeymen" is said to have originated in the railroad industry where a journeyman was considered a totally competent craftsman who could take his tools and apprentice and travel to remote parts of a railroad to perform his work as a skilled craftsman essentially on an unsupervised basis. A "journeyman" or "tradesman" need not be described as a "skilled journeyman" or "skilled tradesman" because the word journeyman or tradesman already denotes the highest level of

skill in a trade. In short, the term journeyman or tradesman refers to a person who can work with little or no supervision and who represents the highest level of proficiency in a craft. See *Swinerton and Walberg Company* (1977), 68 L.A.C. 940 (Schedler). The notion of "certification" pursuant to legislation requiring the training and certification of tradesmen is today a further guarantee of proficiency. Thus, persons who constitute certified tradesmen or journeymen and who are referred to an employer by way of a hiring hall provision cannot be considered untested and untried potential hires "from the street" as in a manufacturing or service context. Because journeymen and tradesmen are expected to have a minimum level of proficiency, an inference that the employer has agreed to fetter its hiring discretion, or subject it to arbitral review, is not *prima facie* an unreasonable conclusion.

33. The second point giving rise to the nature of a hiring hall is the peculiar relationship between employer and employees in the construction industry as was discussed in the case of *R M Hardy and Associated Limited and Teamsters, Local Union 213*, [1977] 2 Can. L.R.B.R. 357 where the chairman, Professor P.C. Weiler, observed the following:

Most of the workmen in the construction industry are skilled tradesmen, usually having obtained tradesmen's qualification certificates after years of apprenticeship. Each of the distinctive trades has its own craft union, which may have a century-old tradition of representing its members in collective bargaining with the contractors who employ members of that trade. But most building trade unions have another role besides the customary representation of employees in collective bargaining: the hiring hall function. The reason is the highly cyclical nature of employment in the construction industry - stemming both from the rhythm of individual projects and the intermittent and erratic pattern in which major construction investments are brought on stream. In response to that pattern, contractors - whether general or specialty contractors - normally do not maintain a regular work force. They may retain a nucleus of key employees, but the bulk of their workmen are recruited as and when they are needed for a specific project for which the employer has obtained a contract. Where do they get these tradesmen? Through the union which represents that craft. The union office keeps a list of available tradesmen; the contractor phones the union office for certain kinds and numbers of workmen; and the crew is then dispatched through the union hiring hall to the job site. *In effect, the trade union performs the basic personnel function in the construction industry, by allocating jobs among the members of the work force.* Any one tradesman may be employed by a number of contractors in a number of areas in any one year. Besides paying the immediate take-home wages to the tradesmen on the job, the contractor also forwards directly to the union hourly contributions for health and welfare, vacation, and pension benefits, and these funds are administered by the union for its members. And the consequence is that the primary and enduring relationship in construction is between craft unions and tradesmen-members, not between employer and employee.

[our emphasis]

34. It is against the background of these observations that one must consider the various cases dealing with the effect of hiring hall provisions on employment status. It has been clearly established that persons in a hiring hall and not yet in the active employ of an employer can seek relief under a collective agreement and be awarded damages for the breach of a union hiring hall provision. See *Re Blouin Drywall Contractors Limited and United Brotherhood of Carpenters and Joiners of America, Local 2486*, [1975] 57 D.L.R. (3d) 199 and *McKenna Brothers Limited and Plumbers Union, Local 527* (1975), 10 L.A.C. (2d) 273 (Shime). See also *Eton Construction Limited*, [1981] OLRB Rep. July 872. It has also been held that the refusal of a local union to refer tradesmen can amount to an unlawful strike of such tradesmen even though they are not in the active employ of the employer in question. See *Local 273, International Longshoremen's Association v. Maritime Employers Association*, [1979] 1 F.C.R. 120. On the other hand, we note the apparent need of the Legislature to enact section 69 of the Act in order to create a duty of fair representation for those in the hiring hall but not yet employees within the meaning of section 68. But whatever the legal significance of section 69, the court cases do suggest that in the construction industry and in like industries, there is in law, and without specific contractual wording to the contrary, a very close relationship between being in a hiring hall and

having employment status. Precisely, how close will depend on the circumstances of any particular case.

44. In *Joe Portiss*, [1983] OLRB Rep. July 1160, the Board wrote:

6. The hiring hall is a significant component in the administration of employment in the construction industry. Before the advent of unionism employment in the construction industry was not methodical, often being governed at the whim of employers and their personnel agents. Without the hiring hall employees, notably in the construction industry and the maritime industries, were too frequently the victims of abuse and arbitrary treatment at the hands of employers. (See, generally *Hearings On Hiring Halls In The Maritime Industry*, Sub-Committee On Labour Management Relations Of Senate Committee On Labour And Public Welfare, 81st cong. (2d) ses. 100-01 (1950) and Bastress, "Application of a Constitutionally Based Duty of Fair Representation to Union Hiring Halls" [1982] West Virginia Law Review 31). If they are operated fairly hiring halls provide an equitable and efficient means to distribute jobs, particularly in industries where jobs are temporary and manpower needs fluctuate. In these situations the union is well suited to act as an employment agency.

7. The hiring hall offers advantages to both employees and employers. It saves the employee from the need to canvas numbers of employers in an often fruitless search for work, acting as a clearing house in which available jobs and available workers can be matched. Particularly in periods of high unemployment it also provides the worker with a rational and objective system for the more equitable distribution of work among all employees rather than to the privileged few. The employer gains to the extent that the hiring hall relieves him of the need to screen and recruit employees with adequate qualifications for short term jobs. The employer avoids the administrative cost he would otherwise bear as well as incidental costs which he might have to incur to retain a crew of workers through slow periods to insure available manpower in busier times. A well run hiring hall will give the employer a ready pool of labour from which he can draw on short notice with little or no administrative cost. Moreover, to the extent that the hiring hall dispatches the same members to different kinds of jobs for different employers, as is notably the case for labourers, it may engender a work force with greater experience and sophistication, which will also benefit the employer.

8. To the extent that the hiring hall functions as an employment agency it vests considerable power in the hands of union officers in charge of its management. Through the administration of hiring hall rules, including the determination of qualifications and classifications of employees, the union officer in charge of a hiring hall has a substantial degree of control over the employment opportunities of union members. The hiring hall systems effectively vests in those union officers powers and prerogatives which were previously associated with an employer. Control over the employment opportunities of hundreds, and sometimes thousands, of union members involves the exercise of a considerable amount of power over their lives. By the enactment of section 69 of the Act the Legislature introduced certain minimal safeguards against abuse of that power.

9. The advantages of the hiring hall system and the potential for their abuse were well summarized by Professor Bastress in the following passage at page 31:

The union hiring hall has been one of the major developments in twentieth century labor relations. It has provided many industries with a means of efficiently matching unemployed workers with job vacancies and has replaced a system of haphazard, unjust, and corrupt employment practices. Yet it has also developed substantial problems of its own. A hiring hall is fraught with potential for abuse, and, indeed, that potential is all too frequently realized. The largely unreviewable discretion of union business agents and inadequate protection for workers can combine to make hiring halls a mixture of whim, nepotism, prejudice and irrationality.

45. The operations of the hiring halls operated by the different trades vary greatly, but they are all characterized by the "referral" or "out of work" list. Members of the union seeking work are placed on the list, in a position or order set by the particular union, and then referred to employers upon request. The referral through the hiring hall of a particular tradesman to a particu-

lar job must necessarily mean that someone else on the referral list did not get referred to that job. One's place on the list, and thus opportunity for work, is of paramount importance in the current economy, where trades have hundreds or thousands of unemployed members currently registered on the list. Where there are substantially fewer opportunities than workers, and long periods before one might be referred to another job, it is critical that referrals are properly made.

46. It is also critical that any objection to a referral be made expeditiously. An attempt by a disgruntled member to challenge a decision that referred another member to a job cannot help but have immediate ramifications for both the member or members who were referred to the job in question, and more importantly, for all other members who have been referred to other jobs in the intervening period. For that matter, it will also affect members who were not referred to jobs, but who are registered on the list. The entirety of the hiring hall, its list, its rules, its practices, together is an interrelated web of structures and mechanisms. In challenging a particular referral, a member challenges the union's performance of one of its key duties, and potentially challenges referrals of other members.

47. A challenge to a referral, if upheld, will pose difficult remedial problems. Many referrals will have been made while the dispute remains outstanding. Virtually everyone on the list will have changed their position on it, and thus their entitlement to new job requests, and many will have been referred to jobs that a complainant claims. A remedy seeking to change a particular referral will affect many, not only the complainant, the union, and the employer.

48. Delay in construction is critical. Complainants challenging specific referrals must move quickly to do so, at risk of the Board declining to hear the merits of their complaint. This is not to suggest that the Board will not consider factors other than the passage of time in deciding how to exercise its discretion. It will still look to, for example, when a complainant became aware of the particular violation, the nature of the remedy claimed, the intervening events, the explanation for the delay, and so on. But in construction, particularly where complaint is made about the hiring hall and particular job referrals, the Board's suggestion in *City of Mississauga, supra*, that timeliness ought generally to be measured in "months rather than years" has particular resonance.

49. Much of this complaint focuses upon the provisions of sections 47(2) and 70 of the Act. Mr. Dumeah complains that he was improperly expelled from the union, and his problems with job referrals and discharges were a direct result of this expulsion. But his expulsion, per se, is an internal union matter. In the *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787*, OLRB File No. 0148-93-U, April 20, 1994, (as yet unreported), the Board wrote as follows:

25. Under the *Labour Relations Act* a trade union can become the exclusive collective bargaining agent for a group of employees in a defined bargaining unit either by voluntary recognition or by showing that the majority of employees wish to be represented. Once the union has acquired the right to represent those employees, they can no longer bargain individually with their employer, nor can any other trade union bargain for them. Dealings with their employer must be channelled through the union, and their conditions of employment are regulated in accordance with the negotiated terms of the collective agreement. In the construction industry, the typical collective agreement requires employees to be members of the union, and requires employers to meet their personnel requirements by hiring out of work union members, who are directed to employment by the union through the local "hiring hall".

26. In a unionized setting, then, an employee no longer bargains on his own behalf. He must bargain collectively and deal with his employer through the union. However the union's status as exclusive bargaining agent, carries with it a concomitant responsibility to fairly represent all employees in the bargaining unit for which the union has bargaining rights - whether or not they are members of the union. Since the employee cannot bargain with the employer on his own,

and must rely on the trade union for this purpose, the statute requires the union to represent employees in the bargaining unit in a manner that is neither “arbitrary, discriminatory, or in bad faith”.

27. A similar standard is applied to the operation of the hiring hall. The union must operate this job allocation mechanism in a manner that is not “arbitrary, discriminatory or in bad faith”. Section 70 was added to the Act because section 69 is limited to *employees in bargaining units*, and unemployed union members - while perhaps “*prospective*” employees - would not fall within the ambit of section 69. Section 69 deals with the rights of employees, while section 70 deals with the rights of potential employees.

28. Under section 69, therefore, the union has a statutory obligation to fairly represent employees in the bargaining unit in their dealings with their employer. *But section 69 does not regulate trade union organizations, as such, nor does it regulate all of the activities in which a trade union might be engaged.* In particular, section 69 does not deal with what might be described as “internal union affairs”.

29. Matters such as the qualifications for membership, the rights of members vis-a-vis the union or each other, elections, union meetings, the powers of union officers, general decision-making processes of the union, and so on, are not regulated by the *Labour Relations Act* at all. It is the union’s constitution which governs the internal workings of the organization (see the analysis of the Court of Appeal in *Astgen v. Smith*, [1970] 1 O.R. 129, and see generally G. W. Adams *Canadian Labour Law* at chapter 14). In this respect, a union is like a club, church or other voluntary association. The rights and duties of members, including qualifications for membership and expulsion from membership, are set out in the organization’s constitution.

30. This is not to say that a trade union is “above the law” or immune from legal regulation. The trade union’s constitution is a kind of “contract” which can be enforceable by Courts at the instance of the member, in the same way as any other contract. Similarly, a union may have obligations under health and safety legislation, human rights legislation, pension regulations, and at common-law. If a trade union owns or administers property, directly, or in trust, the use or disposition of that property may be subject to a variety of legal restrictions or fiduciary obligations. And so on. But the internal affair of unions are not generally regulated by the *Labour Relations Act*.

31. If a union member believes that his rights have been denied, he may seek relief through the process and in the forum created by the legal framework (contractual, common-law or statutory) that creates the “right” in the first place. That is what Mr. Moore did when he sued the union, its officers, and, inferentially, his fellow members whose dues money would provide the funds from which any recovery would be paid. Mr. Moore claimed that the defendants had breached their common law or contractual obligations to him, and he went to court to get a remedy. In the same way, a union member who claims that the union constitution has not been properly applied, or that his rights as a member have been infringed, may pursue any dispute settlement mechanism provided in the constitution then apply to the Courts for further relief. That is what happened here, in part. Certain aggrieved union members took action against Mr. Moore under the union constitution because, they said, the timing or content of Mr. Moore’s allegations were in breach of the constitution and inconsistent with Mr. Moore’s obligations as a union member. Those allegations were considered in the forum provided by the constitution for that purpose. Whether the charges were *properly* considered under the constitution, we do not, of course, decide.

32. In summary, then, the union, its officers, and members, are subject to a multi-faceted legal framework of which the *Labour Relations Act* is only a part. The Legislature has not given the Board a general power to regulate trade unions *as such*, or everything that trade unions do. Nor has membership in a particular trade union being converted into a general “statutory” right. And where the legislature has chosen to protect *employees* from the consequences of a loss of union membership, it has done so explicitly. Thus, section 47(2) reads as follows:

(2) No trade union that is a party to a collective agreement containing a provision mentioned in clause (1) (a) shall require the employer to discharge an employee because,

- (a) the employee has been expelled or suspended from membership in the trade union; or
 - (b) membership in the trade union has been denied to or withheld from the employee,
- for the reason that the employee,
- (c) was or is a member of another trade union;
 - (d) has engaged in activity against the trade union or on behalf of another trade union:
 - (e) has engaged in reasonable dissent within the trade union;
 - (f) has been discriminated against by the trade union in the application of its membership rules;
- or
- (g) has refused to pay initiation fees, dues or other assessments to the trade union which are unreasonable.

The focus in section 47(2) is the protection of an individual's *employment*, not his right to *membership* in the union; however the very presence of section 47 indicates a legislative recognition that union members may occasionally be expelled from membership. Nothing in the Act explicitly regulates or prohibits such expulsion.

33. Union membership, *as such*, is not a protected *statutory* right nor is a union prohibited from expelling someone from membership - although in some circumstances an *employee* may be protected from the consequences of the loss of union membership, and there may be limitations on actions taken to *compel* membership in a union or *discourage someone from joining a union*. Similarly, if a loss of union membership means the loss of access to employment through a hiring hall, the circumstances might be considered under section 70 (See: *Ontario Hydro*, [1980] OLRB Rep. July 1039). And, of course, just as the union constitution may set qualifications for membership, the expulsion from membership must follow the procedures prescribed in the Constitution. The fact that a matter is not covered by the *Labour Relations Act* does not mean an aggrieved union member is without remedy.

34. As we have noted, quite a number of matters do not fall within the ambit of the *Labour Relations Act*, nor within the particular purview of section 69. That section is limited to the way in which the union, as *bargaining agent*, represents *employees in a bargaining unit* vis-a-vis their employer. If the conduct complained of does not fall under that umbrella, there is no remedy under section 69 - although there may well be a remedy under some other section of the Act, or some other legislation, or at common-law, or in some other forum. Similarly, if the conduct complained of does not fall within the ambit of section 71 there is no relief from the Board - although, again, there may be remedies elsewhere.

50. In *Ontario Hydro*, [1980] OLRB Rep. July 1039, the Board wrote as follows:

15. In the case at hand the Board is not dealing with a question of improper referral, including failure to refer, to employment from the Local 506 hiring hall, rather it is dealing with the removal of the complainant's eligibility to be on the out-of-work list. The removal of his eligibility has resulted from internal procedures under the respondents' constitutions. While this Board has no specific authority under the Act to undertake any sort of watch-dog role over a union's internal processes under its constitution and by-laws, the Act clearly gives it authority to determine whether a union had breached its section [70] duty. This in turn may require the Board to examine the union's conduct under its constitution and by-laws. While the Board is reluctant to invade the internal procedures of a trade union, it does so when it becomes essential to the exercise of the Board's authority and responsibility under the Act. See for example, the Board's decision in *George Zebrowski*, [1977] OLRB Rep. Mar. 143, in which the Board reviewed the procedures followed by the trade union under its "Constitution and Laws" in expelling the complainant from membership in the union, as a consequence of which the complainant was discharged from his employment. Another example of the Board finding it necessary to review a trade union's internal procedures is found in the Board's decision in *Rupert S. Martin*, [1977] OLRB Rep. 671. The Board in that case, in order to determine whether section [70] of the Act

had been breached, reviewed the internal decision-making process by which the respondent trade union decided not to refer the complainant to any employers who were seeking to employ members of the respondent through its hiring hall. In that same decision the Board dealt also with a question of whether one officer of the trade union had authority to make the decision not to refer the complainant to employment. In dealing with that issue, the Board acknowledged that it "... does not have the authority to police union constitutions and by-laws." and then stated:

"This is not to say, however, that where a union's constitution or by-laws have been deliberately flouted or where certain steps have been taken notwithstanding a challenge that they might be in violation of the constitution or by-laws, that those actions might not be a relevant factor in determining whether or not a breach of section [70]a has occurred."

In a like manner, the Board finds it essential in the circumstances of the instant case to review how the complainant was dealt with by Local 506 under its constitution and by-laws in order to determine whether there has been a breach of section [70]a of the Act.

And see, for example, *Michael A. Rankin*, [1993] OLRB Rep. July 644.

51. It is in the statutory and policy framework in the construction industry described above that the Board assesses here the consequences of delay.

52. The first two events complained of occurred in April and December, 1991. Mr. Dumeah asserts they constitute breaches of section 82(2) of the Act. The nature of the alleged breaches, that Mr. Dumeah was somehow threatened or coerced because of his participation in a Board proceeding or the exercise of his rights under the Act, is such that the Board expects a party so complaining to move expeditiously in filing a complaint. A complaint about coercive activity that interfered with the ability of the complainant to exercise his rights under the Act has little material content when the complaint is not filed expeditiously, and, as here, is filed years, and numerous hearing days, after the allegedly threatening behaviour. No good reason has been offered for the delay in complaining about these activities. A period of approximately two years is far too long. These two matters are dismissed in their entirety on grounds of delay.

53. The third matter complained of finds its genesis in the physical altercation that took place in the union hall in May, 1992, which in turn led to criminal charges being laid by each of the combatants against the other, and to the union charges being laid against Mr. Dumeah. The alleged breach by the union lies in its failure to allow Mr. Dumeah reasonable and fair access to the hiring hall documents, and by the union preventing Mr. Dumeah from filing charges, under the union constitution, against his assailant. These events similarly occurred too long before the complaint was filed for the Board to now entertain an allegation that they breached the Act. Again, no good reason has been raised for the delay in filing the complaint, here a delay of approximately one and a half years. Mr. Dumeah sought access to the lists in order to challenge particular referrals, whether affecting him or Mr. Smith. If he wished to complain about being denied proper access so that he could complain about improper referrals, he ought to have done so considerably earlier.

54. The same is true of his complaint that he was not allowed to lay charges against a fellow member. Charges against a member, as this case illustrates, are extremely serious and can lead to serious consequences. Had he wished to pursue this complaint, he should have done so long before the passage of over a year and a half. To allow such complaint now, long after the events in question, long after criminal charges were filed and pursued, would be prejudicial and unfair to both the union and the union official involved in the incident with Mr. Dumeah. These aspects of the complaint are also dismissed.

55. The fourth matters complained of concern the Flint Riggers project. Mr. Dumeah filed grievances with respect to work at Flint before November, 1992 and also complains that he should have been referred again in November, 1992. The Flint referrals in question took place over a year prior to the filing of this complaint. During this period there would likely have been hundreds of referrals to jobs, emanating out of this hiring hall. The many other members who might have been referred to jobs during the intervening period would have been unaware of his objection. Their rights might be affected should he be successful, as the remedial relief requested would affect the position of other employees on the referral list, and the order of their referral to future jobs.

56. It may be true that challenge to a particular referral will lead to limited ramifications for other members, if the only order that issues is an order reinstating the member to the top of the referral list. Even so, all other members will still be bumped one place down the list. And even so, the complaint is challenging the manner in which the hiring hall has been administered by the union. As time passes, it becomes more and more difficult to attempt to reconstruct how the hall should have been operated, and whether the complainant suffered any loss, and what remedial correction is necessary in order to properly compensate the complainant, without harming other members.

57. As well, employers in the construction business must be able to obtain workers quickly, efficiently, and reliably. The hiring hall system exists in part to ensure this. While challenges to particular referrals will always occur, they must be made expeditiously. Otherwise employers will constantly be litigating the question of the proper composition of their workforce. This will in turn prejudice their ability to manage the construction project proficiently. They will not be confident that they can retain their current employees, or that others will not replace them. The purpose of the hiring hall system will be undermined.

58. The delay here, of approximately 13 months, is too long, given that the assertion is that a particular referral (or non-referral) was in breach of section 70 of the Act. This part of the complaint is also dismissed.

59. Similar concerns over delay exist with respect to Mr. Dumeah's complaint that the union would not assist him with the grievances he filed arising out of his employment at Flint. He has waited thirteen to fifteen months (depending on the particular grievance) to assert that his union should have taken his work-related grievances to arbitration. These grievances deal with his referral to the particular job and matters that occurred at the job. This delay is too long, given that this referral and employment arises in the construction industry. This part of the fourth matter complained of is also dismissed.

60. Jumping ahead, the sixth aspect of the complaint is Mr. Dumeah's assertion that his discharge by K.E.W. in March, 1993 was unlawful. He asserts that both the company and the union breached the Act. Mr. Dumeah's immediate response to the discharge was to pursue a complaint before the Ontario Human Rights Commission. Although he was himself effectively immobilized from the beginning of June until October, 1993, his representative, Graham Smith, continued to actively assist him during this period. Mr. Smith phoned individuals on behalf of Mr. Dumeah, and filed complaints on his behalf. The complaint before the Ontario Human Rights Commission was filed on June 17, 1993, less than three weeks after the surgery that Mr. Dumeah relies on to justify his delay in filing this complaint. In these circumstances, the Board does not accept that the surgery, and Mr. Dumeah's subsequent stress fracture, provide any reason for his delay in filing the instant complaint.

61. As with his complaint over his Flint employment, Mr. Dumeah has waited too long. The facts do not clearly disclose the duration of the job at K.E.W. However, given the limited type

of work that Mr. Dumeah was physically able to perform, the construction industry context, and the typical referrals he had received before, it is not likely that the job would have lasted long beyond March, 1993. Mr. Dumeah concedes he was unavailable for work as of the beginning of June, 1993. Mr. Dumeah waited approximately eight months after his discharge to file the complaint. Employers in the construction industry must know quickly if challenge is to be made about the operation of their business. Unions must know quickly if a member is going to assert his referral to or discharge from an employer was improperly managed or instigated by the union. Eight months is too long to wait. Work in the industry is too fluid and occasional to impose on parties an industrial standard of "delay". In construction, both employer and union need to know where they stand, and to move on. To sanction disruption months after the event would be significantly disruptive to their relationship and unduly expensive and obstructive. This aspect of the complaint is also dismissed on the grounds of delay.

62. All that remains is the fifth matter (chronologically speaking), that Mr. Dumeah, in breach of section 70 of the Act, was improperly struck from the hiring hall referral list because of his improper expulsion from the union in September of 1992. Mr. Dumeah immediately appealed his expulsion, effectively notifying the union of his challenge to its actions and of his pending removal from the list. Again, although expelled then, the union did leave his name on the list, and continued to refer him, until March 1, 1993, when his appeal was denied. Because the removal was due to his expulsion, he cannot get back on the list. However, he could not have alleged a breach of section 70 (on this basis) until actually removed from the list at the beginning of March. The delay is therefore one of nine months.

63. In an industrial setting, when an employee is discharged, s/he loses his or her employment with a particular employer. S/he is free to seek employment elsewhere from other employers. In construction in Ontario, the vast majority of construction work and employment is unionized. Union representation, work, and work opportunities are generally divided on a "trade" or "craft" basis. For the most part, the bargaining agents are international unions, each of which effectively controls the exercise of a particular trade or craft within the Province. Indeed, because of their international scope, they effectively control work in the craft throughout Canada and the United States. For a member to be expelled, and struck from the list, is effectively to say to that individual that his or her work opportunities in the craft are severely restricted, if not totally circumscribed.

64. Although the complaint about his removal from the list does not challenge a particular referral, Mr. Dumeah's challenge does have ramifications for how the hall was administered in the period before he filed his complaint, and the remedial relief sought will have much the same effect as challenges to particular referrals. In effect, Mr. Dumeah seeks remedies that will reinstate him to the position he would today have on the referral list, but for his improper expulsion, and that will compensate him in damages for lost job opportunities because of his expulsion. He thus seeks, as with challenges to particular referrals, to overturn the decision not to refer him, to reclaim his proper (as he asserts) position on the list, and damages for the improper non-referrals. As with challenge to a particular instance of non-referral, he questions potentially all the referrals made since his removal from the list, asserting he should have and would have been referred but for his improper expulsion and consequential improper removal from the list.

65. For these reasons, a section 70 complaint asserting improper removal from the hiring hall list ought to be brought in quick fashion, just as a challenge to a specific referral or series of referrals. Both types of complaints object to the administration of the hiring hall by the union. Both types of complaints seek remedies that require the parties and the Board to attempt to reconstruct the series of referrals that have occurred since the impugned referral or removal from the

list. In both, a complainant seeks remedial relief that will reinsert him/her on the list, in the position they would be but for the breach, and compensation for missed referrals.

66. Nevertheless, this aspect of the complaint will not be dismissed on grounds of delay.

67. There are a number of reasons for this decision. Primary among them is the significance of the decision removing an individual from the hiring hall list, as expressed above. The impact of such a decision mitigates in favour of a less stringent standard of timeliness than in the case of challenge to a particular referral or referrals, notwithstanding the increasing prejudice to a union as time passes without challenge to the removal decision. The Board is not prepared to say that nine months is too long when the effect of the decision is so dramatic.

68. Although the internal union appeal involves consideration of a different matter than the instant section 70 complaint, in a practical sense the two overlap. The nature of the inquiry in each revolves around the facts leading to the expulsion and the justification for the expulsion. Little of the evidence in either proceeding will deal with the detail of being removed from the hiring hall list, since this generally and routinely follows from the decision to expel from membership. Given this extensive overlap, if not virtual identity, in evidence, an internal union appeal of the expulsion decision by a member, as occurred here, can reasonably be said to effectively put the union on notice of the challenge to its decision, and the probability that it will have to justify its decision to expel. While a union will rightly assume that the matter is to be dealt with through internal union process only (until a complaint at the Board is filed), the prejudice of witnesses and evidence becoming unavailable, and fading recollections, is minimized. The union will be on notice of the need to preserve the evidence and to be prepared to produce witnesses. Only the forum will have changed.

69. As well, the reality is that individual members are under significant pressure not to file complaints at the Board. Indeed, some union constitutions make it an offence for a member to raise complaints outside the union. Even without such a requirement, members can be effectively ostracized if they raise complaints about union activity outside the union. Thus there are practical reasons which delay the filing of complaints, while members seek other less confrontational ways to obtain redress. Too short a period for filing a complaint may therefore place unrealistic burdens on members. Nor should the time be so short that members don't continue to try to work out their problems internally.

70. These factors lead the Board to conclude that a delay of nine months, even without reasonable excuse, is not so long as to cause the Board to decline to hear the complaint, and accordingly it will proceed, but solely on the aspect that the union breached section 70 when it struck Mr. Dumeah from the hiring hall list, because of his expulsion from the union in September, 1992.

71. This matter will be relisted for hearing, to consider the submission of the union that the remaining aspect of the complaint fails to disclose a *prima facie* case, and for all other issues.

72. K.E.W. no longer appears to have any interest in the proceedings and accordingly, it is removed as a party.

73. It may be that the delay will affect remedial relief that might otherwise issue, if the complainant is successful. However, this matter is best considered at the end of the hearing.

0339-94-U United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 819, Applicant v. 655270 Ontario Inc. c.o.b. as **Eastern Welding**, Responding Party

Construction Industry - Discharge - Discharge for Union Activity - Practice and Procedure - Unfair Labour Practice - Board finding union's 8 1/2 month delay in bringing application undue and without justification - Application dismissed

BEFORE: *Bram Herlich*, Vice-Chair.

APPEARANCES: *Neil Meikle, Larry St. Germain* and *Brian Christie* for the applicant; *Peter Chauvin, Jim Shoniker, Paul Belanger* and *Ron MacDonald* for the responding party.

DECISION OF THE BOARD; June 15, 1994

1. This is an application filed pursuant to section 91 of the *Labour Relations Act* in which the applicant (also referred to as "Local 819" or the "union") alleges that the lay off of Doug Reed (also referred to as the "grievor") by the responding party (also referred to as the "company" or the "employer") was in contravention of sections 67 and 71 of the Act.

2. In view of the ultimate disposition of this case, it is not necessary for me to set out the facts in great detail or to resolve various conflicts in the evidence offered by the parties. I will, however, set out some basic and largely uncontested facts and advert to some of the disputed evidence.

3. In late July of 1993, the employer, in anticipation of a contract for work to be performed at the Nestle Foods plant in Chesterville during a planned shutdown, advertised for the services of 2 certified pipefitters. The ad came to the attention of Larry St. Germain, the business manager of the union, who, in an effort to further a possible certification application, had discussions with the grievor, a member of Local 819. Mr. Reed applied and was hired by the employer in a classification it describes as "fitter A". He worked at the Nestle site from August 3, 1993 until his lay off on the morning of August 16, 1993.

4. It is the employer's motivation for the lay off of the grievor which is at the heart of the matter. The company's evidence, which included the testimony of James Shoniker, president of the employer, and of Ronald MacDonald, the project engineer for the Nestle plant, suggested that time and budget overruns led to the need for Nestle to crew down the services of the various contractors working on site during the shutdown. The union argued that on the basis of its evidence, much of which was disputed, the Board could and should conclude or infer that improper anti-union motives provided part of the explanation for the grievor's layoff.

5. The employer argued three distinct grounds upon which it asserted the application ought to be dismissed. The Board ought to dismiss the application as a result of the undue delay on the part of the applicant in bringing the complaint. The application ought to be dismissed since its prosecution on the part of the union amounted to an abuse of the Board's process. Lastly, the application ought to be dismissed because, after considering the evidence in this matter, the Board ought to be persuaded that no improper motive was involved in the grievor's layoff.

6. The grievor was laid off on August 16, 1993. All of the information which forms the basis of its application was in the union's possession within about a day of the layoff. The present application was not filed until May 2, 1994. On November 2, 1993 an application for certification

was filed in respect of the employer. The applicant in that matter (which is Board File No. 2740-93-R) is the Ontario Pipe Trades Council (the "Council") and Local 819. As a result of a dispute regarding the list of employees in the bargaining unit on the date of application (a dispute which centres on whether Robert Metcalfe was performing bargaining unit work on the application date), a Labour Relations Officer was appointed to conduct the relevant examinations which commenced in April and concluded in May of this year. That application remains unresolved.

7. In its reply to the instant application the company indicated that it would argue that the application should be dismissed on the grounds of undue delay. This position was repeated at the commencement of the hearing, although at that time employer counsel indicated that he was content to argue the issue "at the end of the day" after the Board heard all of the evidence in this matter.

8. Despite the clear advance indication from the employer that delay would be raised as an issue, the union chose to call very little evidence to explain its delay in filing the application. The evidence it did call came from Mr. St. Germain, who testified that Brian Christie, an official with the Council, was involved throughout and on a continuing basis with respect to both the instant application and the certification application just mentioned. Indeed, although only Local 819 and not the Council is a party to the present application, Mr. St. Germain was emphatic in his evidence that the decision around the timing of the filing of the instant matter was Mr. Christie's. Shortly after his layoff, the grievor, Mr. St. Germain and Mr. Christie discussed what action could be taken. According to Mr. St. Germain, Christie explained (presumably that a section 91 complaint could be filed, although the evidence was less than explicit in this regard) that no action should be taken for the moment because they were working towards a certification application and they didn't want to "screw that up"; action with respect to the grievor's layoff could be taken at a later date.

9. As already mentioned, the contemplated certification application was filed on November 2, 1993. And while the delay in filing the present matter up to that date might well not be fatal to the application, there is no evidence whatsoever before the Board to explain why the instant application was not filed along with the certification application or shortly thereafter. When asked about this in cross-examination, Mr. St. Germain essentially confirmed that the decision was Mr. Christie's and any explanation for the further six month delay would have to come from him. Mr. Christie, although present throughout the proceedings, did not testify.

10. Counsel for the union made some noble efforts in argument to fill in the evidentiary holes regarding the reason for the union's delay. With respect to the period of time between the layoff (August 16th) and the filing of the certification application (November 2nd), counsel argued that the union did not wish to call its organizing efforts to the attention of the employer, an unavoidable result of filing a section 91 application. At first blush this submission appears attractive, but little reflection is required to recognize its shortcomings. Either the employer was or was not aware of the union's activities at the time of the grievor's layoff. If the Board were ultimately satisfied that the company had no knowledge of the grievor's union activities then, as union counsel conceded, this application would, in all likelihood, be dismissed. Indeed, much of the union's case rests on its (disputed) evidence and other arguments from which it asks the Board to conclude or infer that the employer, at the time of the layoff, was aware of the grievor's union activities which were tied to a possible certification application. Since the union's case is and must be that the employer was aware of union activity, the assertion that delaying the filing of a section 91 application would shield the union's legitimate but surreptitious conduct is less than convincing. Counsel attempted to buttress this point by suggesting (again, without any evidentiary base) that it was not only Local 819's activities that were sought to be hidden from the employer, but also the

involvement of the Council. Given that even when this application was ultimately filed, some 8-1/2 months after the impugned layoff, the Council was not an applicant nor was any representative of the Council required to testify, it is not entirely clear that there would have been any necessity to disclose the involvement of the Council had the application been filed in a timely manner.

11. In respect of the second period of delay from the filing of the certification application (November 2, 1993) to the filing of this application (May 2, 1994), counsel (again, without evidentiary foundation) argued that the union saw no need to file an application since it anticipated a speedy resolution of the certification application. It is difficult to reconcile that submission with Mr. St. Germain's evidence that the main reason for proceeding with the application was to secure monetary damages for the grievor, a matter which would not be a subject of the certification application. Counsel acknowledged that the fact that the grievor's case may, to some extent, have been out of sight and out of mind contributed to the union's delay.

12. In relation to the issue of delay the parties relied upon a number of Board decisions including *Sheller-Globe of Canada, Ltd.*, [1982] OLRB Rep. Jan. 113; *The Corporation of the City of Mississauga*, [1982] OLRB Rep. Mar. 420; *Caravelle Foods*, [1983] OLRB Rep. June 875; *Catherine Whittaker*, [1985] OLRB Rep. Apr. 621; *Gary Hopkins*, [1985] OLRB Rep. May 684; *Trelford Automobile Limited*, [1991] OLRB Rep. Oct. 1225. All of these cases involved individual applicants who (in all but the most recent case which was a complaint under the *Occupational Health and Safety Act*) brought complaints of unfair representation against their unions under section 69 of the Act. It was not suggested that the concerns and approach in those cases were not applicable to the instant matter. The following passage from the *Mississauga* case (cited above) is often referred to by the Board:

20. It is by now almost a truism that time is of the essence in labour relation matters. It is universally recognized that the speedy resolution of outstanding disputes is of real importance in maintaining an amicable labour-management relationship. In this context, it is difficult to accept that the Legislature ever envisaged that an unfair labour practice, once crystallized, could exist indefinitely in a state of suspended animation and be revived to become a basis for litigation years later. A collective bargaining relationship is an ongoing one, and all of the parties to it - including the employees - are entitled to expect that claims which are not asserted within a reasonable time, or involve matters which have, to all outward appearances, been satisfactorily settled, will not reemerge later. That expectation is a reasonable one from both a common sense and industrial relations perspective. It is precisely this concern which prompts parties to negotiate time limits for the filing of grievances (as the union and the employer in this case have done) and arbitrators to construct a principle analogous to the doctrine of laches to prevent prosecution of untimely claims. (See *Re. C.G.E. 3* L.A.C. 980 (Laskin); *Re. Oil Chemical and Atomic Workers, Local 9-672 and Dow Chemical of Canada Limited* [1966] 18 L.A.C. 51 (Arthurs)).

21. In recognition of the fact that it is dealing with statutory rights, the Board has not, heretofore, adopted any rigid practice with respect to the matter of delay - holding, in most cases, that it will simply take this matter into account in determining the remedy if a statutory violation is established. However, whatever the merits of this approach, the Board must also keep in mind the potentially corrosive effect which litigation can have upon the parties' current collective bargaining relationship - quite apart from the outcome. Adversarial relationships are pervasive enough in our industrial relations system without the resurrection of ghosts from the past. In the Board's view, the orderly conduct of an ongoing collective bargaining relationship and the necessity of according a respondent a fair hearing both require that unions, employers and employees recognize a principle of repose with respect to claims that have not been asserted in a timely fashion. If such claims are not launched within a reasonable time, the Board may exercise its discretion pursuant to section 89 and decline to entertain them.

22. A perusal of the Board cases reveals that there has not been a m[e]chanical response to the problems arising from delay. In each case, the Board has considered such factors as: The length of the delay and the reasons for it; when the complainant first became aware of the alleged stat-

utory violation; the nature of the remedy claimed and whether it involves retrospective financial liability or could impact upon the pattern of relationships which has developed since the alleged contravention; and whether the claim is of such nature that fading recollection, the unavailability of witnesses, the deterioration of evidence, or the disposal of records, would hamper a fair hearing of the issues in dispute. Moreover, the Board has recognized that some latitude must be given to parties who are unaware of their statutory rights or, who, through inexperience take some time to properly focus their concerns and file a complaint. But there must be some limit, and in my view unless the circumstances are exceptional or there are overriding public policy considerations, that limit should be measured in months rather than years.

13. In addition, I have considered some recent decisions of the Board including *Marcel Fortin*, unreported, Board File No. 2044-90-U, July 23, 1991; *John Kohut*, [1991] OLRB Rep. Dec. 1367; and *Frank Vastag*, unreported, Board File No. 2772-93-U; cases in which the application of considerations outlined in the *Mississauga* case have resulted in the dismissal of complaints where periods of delay of 10 months, 9-1/2 months and 8 months were found to be undue. A review of all of the cases referred to indicates that the Board does not adopt a mechanical approach to issues of delay. And although the *Mississauga* case speaks of “months, rather than years”, there may be cases, where depending on a consideration of the relevant factors, a delay of considerably more than a year will not preclude a hearing on the merits of a complaint or, conversely, a delay of considerably less than a year may result in dismissal.

14. It also goes without saying that while considerations of the factors outlined in the *Mississauga* will always be relevant, they should not be viewed as exhaustive; there may be additional concerns peculiar to any particular case. Before applying the enumerated considerations to the present case, some observations specific to the facts before me are in order.

15. The importance of expedition in labour relations matters is something this Board has always emphasized. Nowhere is this more true than in cases where it is alleged that persons involved in organizing activities are discharged because of those activities. Recent changes to the Act have recognized the need for expedition; providing that in such cases a union may apply for an expedited hearing which requires that the matter be listed for hearing within 15 days, that it be heard on consecutive days (Mondays to Thursdays), and that the Board render a decision within two days after the hearing is completed (see section 92.2). In addition, in such cases an application may be made for an interim order under section 92.1 which may provide interim relief even before a hearing under section 92.2 commences. The Legislature has clearly recognized the value and need for timely resolution of these types of cases. Even in the present case, where the union did not seek to take advantage of the options just described, the Board, in its continuing efforts to respond to the time sensitive nature of cases which may not fall under section 92.2, scheduled this application, which obviously involved a discharge, to be heard on consecutive days until completion. Concomitant with the statutory and administrative recognition of the need for expedition, the Board has also expressed the view, at least in applications for interim relief, that it will expect applicants to act with all due dispatch (see for example *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. Apr. 358).

16. This brings us to a more specific consideration of the factors outlined in the *Mississauga* case. The length of the delay in this case (approximately 8-1/2 months in total), though troublesome, is perhaps not significant enough that, standing alone, would warrant dismissal; there is, however, simply no justification for that delay and the union’s conduct in failing to provide the evidence and explanation, if any, of the person chiefly responsible for that delay is telling. It was not disputed that the applicant had all of the information necessary to file this application virtually simultaneously with the events giving rise to it. The remedy claimed involves retrospective financial liability- had the application been filed and resolved quickly (whether or not in conjunction with an application for interim relief) the likelihood of any significant monetary damages resulting would

have been dramatically reduced. The employer was able to call the necessary witnesses and produce relevant documents; it was clear, however, particularly during the testimony of Mr. Shoniker, that there were some difficulties with fading recollections. The union had the advantage of preparing documents, notes and evidence at the time of events which the employer only learned 8-1/2 months later were to be the subject of litigation. Finally, in what may customarily distinguish cases where a union is the applicant from those involving individual complainants, this is not an applicant the Board would likely be prepared to find (and there was no evidence or argument in this regard) was unaware of its statutory rights.

17. In all of the circumstances of this case, I am persuaded that the union's delay in bringing this application was undue. In view of this finding it is unnecessary for me to deal with the company's arguments regarding abuse of process or the merits of the case.

18. This application is dismissed.

0773-93-U; 0774-93-U; 1362-93-U; 0178-94-U; 0179-94-U Mary Anne Green, CAW Local 222 Union Member, Applicant v. John Caines, CAW Local 222 Union Plant Chairperson, Responding Party v. General Motors of Canada Limited ("GMCL"), Intervenor; Mary Anne Green, CAW Local 222 Union Member, Applicant v. B. ("Buzz") Hargrove, CAW National Union President, Responding Party v. General Motors of Canada Limited ("GMCL"), Intervenor; Mary Anne Green, Applicant v. B. (Buzz) Hargrove, CAW Union National President; John P. Caines, CAW Local 222 Plant Chairperson, Responding Parties v. General Motors of Canada Limited ("GMCL"), Intervenor; Mary Anne Green, CAW Local 222 Union Member, Applicant v. National Automobile Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), (1) National Union, (2) Local 222 Union, Responding Party; Mary Anne Green, Applicant v. General Motors of Canada Ltd., Responding Party

Duty of Fair Representation - Ratification and Strike Vote - Witness - Unfair Labour Practice - Applicant alleging that union breached *Act* when it negotiated and secured employee ratification of agreement permitting third shift in employer's Oshawa truck plant - Applicant complaining about process by which agreement concluded - Applicant also complaining about conduct allegedly intended to intimidate or penalize witnesses in Board proceeding - Board concluding that allegations without foundation - Application dismissed

BEFORE: *R. O. MacDowell*, Alternate Chair.

APPEARANCES: *Mary Ann Green* appearing on her own behalf; *L. N. Gottheil, John Kovacs* and *John Caines* for the responding parties; *Jeff Koch* for the intervenor.

DECISION OF THE BOARD; June 7, 1994

I - Introduction

1. This is the complaint of Mary Ann Green, who contends that the “union”, the “company” and certain individuals have contravened various sections of the *Labour Relations Act*.

2. The provisions of the Act to which reference will be made are as follows:

69. A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

82.-(1) No employer, employers' organization or person acting on behalf of an employer or employers' organization shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten dismissal or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

(2) No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary or other penalty on a person.

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

74.-(1) Where a collective agreement is in operation, no employee bound by the agreement shall strike and no employer bound by the agreement shall lock out such an employee.

(2) Where no collective agreement is in operation, no employee shall strike and no employer shall lock out an employee until the Minister has appointed a conciliation officer or a mediator under this Act and,

- (a) seven days have elapsed after the day the Minister has released or is deemed pursuant to subsection 115 (3) to have released to the parties the report of a conciliation board or mediator; or
- (b) fourteen days have elapsed after the day the Minister has released or is deemed pursuant to subsection 115 (3) to have released to the parties a

notice that he or she does not consider it advisable to appoint a conciliation board.

(3) No employee shall threaten an unlawful strike and no employer shall threaten an unlawful lock-out of an employee.

(4) A strike vote or a vote to ratify a proposed collective agreement taken by a trade union shall be by ballots cast in such a manner that persons expressing their choice cannot be identified with the choice expressed.

(5) All employees in a bargaining unit, whether or not the employees are members of the trade union or of any constituent union of a council of trade unions, shall be entitled to participate in a strike vote or a vote to ratify a proposed collective agreement.

(6) Any vote mentioned in subsection (4) shall be conducted in such a manner that those entitled to vote have ample opportunity to cast their ballots.

3. It may be useful to briefly consider how those sections of the Act have been interpreted.

II - The Statutory Framework

4. In order to establish a breach of section 69 of the Act, it must be shown that a union has acted in a manner that is:

- (1) “*arbitrary*” - that is, flagrant, capricious, totally unreasonable, or grossly negligent [see: *Walter Princesdomu* [1975] OLRB Rep. May 444, and *I.T.E. Industries Limited*, [1980] OLRB Rep. July 1001]; or
- (2) “*discriminatory*” - that is, based on invidious distinctions without some reasonable labour relations rationale; or
- (3) in “*bad faith*” - that is actuated by ill-will, malice, hostility or dishonesty.

The behaviour under review must fit into one of these three categories. It must be “arbitrary”, “discriminatory” or undertaken “in bad faith”.

5. Mistakes or misjudgements are not illegal. They do not fall within the scope of section 69. Nor has the Board been quick to regulate internal union affairs. The Board has recognized that there may be legitimate disagreement about how best to promote the interests of bargaining unit members, and the fact that a union official has made decisions with which others disagree, does not mean that such official has contravened the law. The Board’s role is not to second guess the decisions of union officials - especially elected ones - but only to ensure that the union’s conduct is not “arbitrary”, “discriminatory”, or in “bad faith”.

6. Section 74 of the Act regulates strike votes and votes to ratify a proposed collective agreement. Section 74 contemplates a vote of the entire bargaining unit. It provides that the ballotting will be secret, and that all employees in the unit - *not just union members* - will have an ample opportunity to cast their ballots.

7. Section 74 does not prescribe any *particular* notice requirements, nor is it obviously applicable to either “mid-contract” changes to the collective agreement, or to votes in which the union polls members on their views prior to a particular course of action. In fact, the terms of section 74 do not seem to apply to mid-contract revisions at all. The context of the section and the references to “strike votes” both suggest that section 74 applies only to the bargaining that occurs in

conjunction with conciliation (see 74(1)-(4)) - that is, bargaining to negotiate or renew an entire agreement.

8. Section 82 is fairly straightforward. It protects witnesses (and others) from improper pressure. Section 82 ensures that cases before the Board are properly litigated, and that persons who participate in those proceedings are not penalized for doing so.

III - What the Case is About

9. Ms. Green's principle allegation is that the union breached section 69 of the Act when it negotiated and secured employee ratification of an agreement that permitted a third shift in the Oshawa truck plant. That 3rd shift agreement was settled in the spring of 1993. It resulted in the creation of several hundred new jobs.

10. Ms. Green does not herself work in the truck plant. Nor is it clear that the 3rd shift agreement has any direct effect on her wages or working conditions. Nevertheless, Ms. Green complains about the process by which the agreement was concluded. She is supported in this complaint by a number of union officials who were opposed to the terms of the 3rd shift agreement.

11. For ease of reference, I will refer to this group as "the objectors"; for although they are not nominal complainants, they were listed on the complaint, they have associated themselves with the complaint, and they gave evidence in support of Ms. Green's allegations. This case presents the unusual situation of one group of elected local union officials claiming that *their union* has broken the law, as a result of the actions of another group of elected union officials.

12. Ms. Green's other allegations concern conduct which, she says, was intended to intimidate or penalize potential witnesses in this proceeding. Because these collateral allegations were intertwined with the assertions in the main complaint, it was convenient to hear them together.

IV - Evidence and Credibility

13. The Board received the parties' evidence and representations on Ms. Green's various allegations, at a hearing conducted on May 9th - 12th, 1993. All of the parties had the opportunity to call witnesses and lead evidence on the issues that *were relevant to the complaint, and were properly particularized prior to the hearing* (see the directions contained in the Board's earlier decisions which were repeated in mid-April 1994 at a hearing held to address preliminary issues). I make this observation because, throughout the hearing, it was necessary to confine the evidence to the incidents and allegations actually set out in the complaint, and to exclude evidence that was not particularized, that was immaterial, or that was of no probative value.

14. Much of the background is not in dispute. However, in determining the facts and choosing between contradictory versions of events, I have taken into account such factors as: the demeanour of the witnesses when giving their evidence; the firmness of the witnesses' recollection of the events of a year ago; the clarity, consistency, and overall plausibility of the witnesses' testimony when subjected to the test of cross-examination; the ability of the witnesses to resist the tug of self-interest, self-justification, or "political posturing" when framing their answers; and what seems most probable in all the circumstances.

15. I have used the term "political posturing" in the preceding paragraph because a number

of witnesses held elective union office or were partisans of a particular faction within Local 222. Accordingly, this proceeding became a platform to attack the motives and judgement of political opponents, or, alternatively, to justify the collective bargaining stances taken in 1993. That is not the purpose of section 69, of course, but in this case it was probably inevitable.

16. I was told by all of the parties that factionalism, “mud-slinging” and acrimony were a reality in Local 222, where divisions were deep, and (as one witness put it) all of the elected representatives were “politicians”. The parties said that the behaviour of these “politicians” was often motivated by their calculation of “political” advantage. Some of that emerged in their testimony.

17. I have had to take these matters into account when deciding “the facts”, and how those facts match the union’s obligation under section 69.

18. I do not think it serves any labour relations purpose to record particular findings of credibility. I note only that Ms. Green’s testimony was totally unreliable, and has been discounted whenever it is contradicted by any of the other witnesses.

19. It will be convenient to review the relevant events in chronological order.

V - The Facts - The Negotiation of the 3rd Shift Agreement

20. General Motors has a large production facility in Oshawa, Ontario. The employees are represented by the CAW and its Local 222. In early 1993 there were about 14,400 employees in the CAW bargaining unit.

21. In recent years, times have been difficult for the automobile business and GM has engaged in significant restructuring. This restructuring has involved shifts of production (and jobs) from one facility to another, as well as lay-offs in Scarborough, St. Catharines, and elsewhere. Job losses have eroded the union’s membership, and put pressures on its supplementary unemployment insurance benefit plan.

22. The GM plant in Oshawa has not escaped these cut-backs. It was anticipated that in 1993 Oshawa would lose 1,500 jobs as a result of business re-organization and sluggish car sales.

23. In January or early February 1993, local GM management approached the CAW to explore the possibility of establishing a third shift in the Oshawa truck plant. Demand for its particular model was brisk, and a third shift would generate 600-800 new jobs. These new jobs would partially offset job losses elsewhere in the facility.

24. Local management wanted to develop an agreement that would facilitate the introduction of a third shift. Local management wanted to ensure that the jobs were created in Oshawa, rather than at alternative GM facilities in the United States.

25. It is not seriously disputed that there are alternative facilities in the United States which could have provided the production that was contemplated for the Oshawa truck plant. Nor is it seriously disputed that, in recent years, General Motors has been attempting to rationalize its production on a North American basis. I am satisfied, therefore, that the American alternative was real, and that there was no guarantee that these jobs would be created in Oshawa.

26. According to the company, an expeditious arrangement with the union was an important factor in deciding whether to expand production in Oshawa. If the union was receptive, the jobs would probably go to Oshawa. If the union was unenthusiastic or opposed, the jobs could go elsewhere. That is what the company said; but, more to the point: the national union *believed* this

to be so. and urged the leadership of Local 222 to engage in serious negotiations to facilitate the expansion of production in Oshawa.

27. The company was anxious to begin the first phase expansion in June 1993. Time was of the essence. GM indicated that if suitable arrangements could not be worked out relatively quickly, the proposed expansion would be undertaken elsewhere.

28. The use of a third shift is unprecedented in North American manufacturing. The proposal does not seem to involve any serious modification of the Master Agreement, but there were quite a number of issues to be ironed out, and the time for doing so was relatively short.

29. The activities of Local 222 are guided by a "shop committee", which is composed of representatives, elected by employees working in various areas of the facility. There are about 17 individuals on the shop committee. Reporting to them is a much larger group of "committee persons" who are likewise drawn from various parts of the operation. There is a kind of organizational pyramid, with the shop committee at the top, as a kind of "cabinet".

30. But this "cabinet" is unlike anything one would find in the political arena.

31. The shop committee is not a unified decision making body. It is composed of individuals from rival factions, and it is often deeply divided - as it was over the terms to which the union should agree in order to bring jobs to Oshawa.

32. Some representatives on the shop committee thought that the possibility of a third shift provided the opportunity to demand concessions from the company. These representatives discounted the likelihood of the jobs going elsewhere. Other representatives took the company's threat seriously, but nevertheless counselled an aggressive bargaining stance. Still others, including plant chairman John Caines, were concerned that a sluggish or unrealistic bargaining process would kill the chances of bringing the jobs to Oshawa.

33. There was, in short, a disagreement about the tactics and risks associated with bargaining the 3rd shift agreement.

34. The three members of the shop committee drawn from the truck plant undertook the initial discussions with the company; and (despite some of the evidence from the objectors) I am satisfied that those representatives kept the shop committee informed of what was going on. There were also periodic bulletins to employees (for example, exhibit #4 dated March 11, 1993, entitled "3rd Shift Update"). I am unable to determine whether, at this early stage, communication was confined to the 2,200 truck plant workers directly affected by the discussions.

35. Some shop committee members were unhappy with this delegation of authority to the truck plant trio. Some shop committee members wanted direct involvement by the *whole committee*. However, I cannot find that the process selected contravened section 69 in any way.

36. In about April 1993 the Canadian President of General Motors advised the National President of the CAW (Buzz Hargrove) that the talks had bogged down. He said that if the situation was not resolved, GM would "fold its tent" and forget about a third shift in Oshawa. This message was passed along to John Caines the Plant Chairman, who took over the negotiations at that point. In early May, Caines and the company representatives concluded a tentative agreement.

37. The opposing factions in the shop committee were not happy with Caines' involvement (and their exclusion). Nor were they happy with the results of his discussions with the company. And, having heard their concerns, I am satisfied that the two are clearly linked. It is clear that whatever problem the objectors may have had with the substance of the agreement (for example, the re-arrangement of five minutes of "wash up time") they were particularly troubled by a process which, as they saw it, diminished their prerogatives and was unduly influenced by direction from the National Union.

38. This does not mean that the objectors were wrong, or that Caines' agreement was perfect, or that with more time and/or a different bargaining group there might not have been a different, and perhaps more favourable result. That is possible - just as it is possible that the negotiations could have gone off the rails and the job opportunities might have been lost. I need not speculate. It suffices to say that there were different assessments of these risks, and different judgements of what was desirable or attainable.

39. Neither the terms of the 3rd shift agreement nor the way that it was negotiated involve a breach of section 69.

40. Caines decided that the 3rd shift agreement created job opportunities that could have ramifications for employees outside the truck plant - particularly if lay-offs in other parts of the facility might be cushioned by job openings in the truck plant. Caines concluded that the proposed agreement should therefore be put to the entire local union membership for ratification. The objectors were opposed to ratification by the full membership.

41. As far as I can determine, there was no obligation to put the terms of the agreement to employees for their consideration. Nor was this in the nature of a "strike vote", or the kind of ratification vote that occurs when the Master Agreement is re-negotiated every few years. The 3rd shift agreement was a local arrangement, like others the union and employer have concluded from time to time, and such arrangements do not necessarily go to the employees for ratification. On the other hand, there is precedent for putting issues of this kind to the membership, and, in the circumstances, Caines thought that it was desirable.

42. The majority of the shop committee did not. The majority of the shop committee disagreed with both the process and the result of the negotiations. The majority of the shop committee did not welcome Caines efforts to go "over their heads" to the membership. But that, too, has happened before.

43. I heard much argument about the adequacy of notice for the ratification meeting, and the alleged ignorance of employees who came to the meeting to cast their ballots. Accordingly, it may be useful to review some of the communications efforts undertaken by the proponents of the 3rd shift agreement.

44. On or about March 31, 1993 Caines directed the distribution of about 6,000 leaflets, advising employees of the negotiations to establish a third shift in the truck plant beginning in June 1993. A further 6,000 leaflets, with additional information, were distributed the following day.

45. On April 30, 1993 Caines distributed 6,000 more leaflets, responding to other leaflets given out on each of two previous days by the truck plant representatives on the shop committee. The leaflets from the objectors were critical of the third shift proposal and contained what Caines labelled "bad information". Caines' April 30th response outlined his own views on the desirability, alternatives, and impact of the negotiations in which, by that time, he was personally involved.

46. This exchange of pamphlets is indicative of a debate which was then ongoing within the shop committee, and was extended to the local union membership.

47. On or about May 10th Caines caused to be distributed 6,000 - 9,000 copies of a notice (exhibit #15) entitled "Tentative Agreement Reached 3rd Shift Truck Plant! 8,000 New Jobs for Oshawa!" Among other things, this notice outlines the highlights of the truck plant agreement, and sets May 19th as the tentative date for a vote on that agreement. The notice urges employees to set aside time for the meeting, and notes that a pension bonus incentive will also be discussed.

48. On or about May 21st Caines caused to be distributed about 9,000 "for your information" bulletins, indicating that the vote had been put over to the following week (i.e. May 27th) and that a further bulletin would follow. The delay was necessary in order to avoid a clash with local union elections that were being held at about the same time.

49. A further bulletin (exhibit #17) was issued on May 25th, and some 9,000 copies were distributed on May 25th and May 26th. The bulletin indicates the date of the vote, the extended voting hours (to accommodate the day and evening shift) and the place: the Oshawa Civic Auditorium where bargaining unit votes have been conducted in the past. It also highlights the features of the 3rd shift agreement; and, as might be expected, Caines urges employees to ratify the proposal.

50. In addition to these bulletins there were interviews on local radio and TV, and news coverage in local newspapers that also indicate the date and place of the vote. The prospect of 800 new jobs was good news for the local community. The matter was the subject of considerable local attention.

51. It is necessary to say something about the distribution of these various notices and pamphlets.

52. As I have already mentioned, thousands of leaflets were prepared and distributed to various parts of the facility, by persons directed to disperse the leaflets as broadly as possible. Leaflets were distributed to work stations, cafeterias, and bulletin boards where they would come to the attention of employees potentially interested in attending the meeting. However, there was no guarantee that the coverage would be complete, both because of the size of the facility and because there was nothing to prevent persons who disagreed with the agreement from refusing to distribute Caines' admittedly positive pamphlets. Nor was there any way to prevent persons from removing or destroying leaflets containing information with which they disagreed.

53. Mr. Kewley, a member of a shop committee agreed that there had been an element of non-cooperation and that partisans could not necessarily count on the dissemination of information by those who disagreed with them. Mr. Kewley said that he himself felt no obligation to distribute material emanating from Mr. Caines the plant Chairman. Mr. Adams, another member of the shop committee, testified that he would not hand out such leaflets unless he was able to give his side of things at the same time. Mr. Drinkwalter expressed a similar view. In other words, they would not distribute a communication expressing a particular view point unless they had the opportunity to contradict it.

54. These submissions were couched in a laudable desire to ensure that employees "knew the truth". But it is pretty clear that, in these circumstances, "the truth" is not easily distinguishable from opinion, and that some union officials do not consider themselves under any obligation to distribute opinions from political opponents. And the objectors' opinion on the "adequacy" of notice to employees was heavily influenced by their opinion on the arguments contained in the notice, and their opportunity to mobilize, opposition.

55. Any attack on the amount of notice, or the quality of information available on the 3rd shift agreement, must be weighed in light of the fact that union officials such as the objectors may not cooperate in giving notice, or distributing information.

56. Ms. Green testified that notice was inadequate. She said that she went “all over” on an unsuccessful search for leaflets advertising the meeting. She said she couldn’t find any.

57. That testimony is unworthy of belief given the thousands of leaflets that were distributed. I prefer the uncontradicted evidence of Steve Finlay, who distributed leaflets in Ms. Green’s work area, and personally gave one to Ms. Green herself.

58. It may be that employees were not familiar with the details of the third shift proposal, or with the objectors’ criticism of it. However, interested employees had adequate notice of the meeting, and had adequate notice of the subject for discussion.

59. The meeting took place at the Oshawa Civic Centre on May 27th, as scheduled. There were, in fact, two separate meetings: one for the day shift, and a later one for the afternoon shift. The company cancelled overtime so that employees who wished to attend would be able to do so.

60. The union’s practice is to hold a ratification meeting relatively quickly after a deal is struck. That is what happened here. The amount of notice for this particular meeting was not unusual. Nor was the format unusual for a meeting of this kind. That, too, was consistent with past practice.

61. About 2,400 members attended one or other of the two meetings. This is not a large portion of the total membership (14,400), but it must be remembered that the agreement’s primary impact was on the truck plant (2,200 employees), and employees in other areas might not be particularly interested. By way of comparison, I might note that about 8,000 members participated in the local union election the previous week, less than 100 employees attended the May general membership meeting (where the truck agreement was discussed), only 872 members participated in a strike vote authorizing strike action in August 1993, and about 4,000 employees participated in the ratification vote following the re-negotiation of the 1993-95 Master Agreement in September - October, 1993.

62. Against that background, the turn-out on May 27th was not unusual, nor inconsistent with past membership behaviour.

63. Ordinarily employees attending a ratification vote do not have the full legal text of the proposed agreement. They make their decision on the basis of a summary as was done in this case.

64. As employees entered the hall on May 27th, they were offered a pamphlet that summarized the contents of the 3rd shift agreement, and contained a message from the CAW president (Buzz Hargrove) emphasizing the advantages and desirability of the proposal. Mr. Hargrove was present in person to reinforce that message. The meeting opened with the announcement that there would be a debate about the proposal for those wishing to participate.

65. At each meeting Ms. Green made a motion to postpone the vote. Those motions were rejected by union President Hargrove, who explained that this was a “special meeting” for the purpose of ratification, that timely ratification was important, and that the meeting would proceed as scheduled.

66. Buzz Hargrove, John Caines, and others spoke in favour of the proposal. They shared the stage with the members of the shop committee who, by and large, spoke against the proposal. There were also questions and comments from the floor.

67. The debate was heated and derogatory. But I am told that this is not usual for this local, and I am satisfied that those objecting to the agreement had ample opportunity to put their position. Mr. Adams testified that although he was a shop committee member and opposed the proposal, he did not consider it necessary to speak because all of his concerns were voiced by others.

68. The objectors complain that the polls were open continuously from 1:30 p.m. to 6:30 p.m., so that employees could cast their ballots and leave before the meeting was over. The objectors assert that the members should not have been allowed to vote until the debate was concluded. The objectors claim that the members were confused, and did not really know what they were voting for.

69. Local president John Kozac explained that many union members were totally “fed up” with the vilification and back biting that characterize local union politics. These members have little interest in listening to union officials trade abuse. The members want the flexibility to register their vote, and leave. The polls were open from 1:30 p.m. so they could do that if they wished.

70. In the circumstances, I see no difficulty with an arrangement that facilitates this employee choice.

71. The voting itself was supervised by an outside auditor who has supervised a number of votes taken by Local 222 over the years - including the executive elections in May 1993. The auditor took precautions to ensure that only members in good standing were entitled to vote. There is no evidence of voting irregularities.

72. The membership voted in favour of the third shift proposal by a margin of two to one. About 1,600 members voted in favour. About 800 members voted against. The proposal was ratified.

73. Once ratified, the 3rd shift agreement became part of the local agreements that apply to particular parts of the GM facility. Those “local” agreements flesh out the terms of the Master Agreement.

74. For completeness, however, I should note that these local agreements *also* form part of the Master Agreement, and thus are reconsidered and renewed every two or three years in conjunction with the central bargaining. That is what happened in 1993. In September - October 1993, the 3rd shift agreement figured in a minor way in the master bargaining, and was part of the overall package that was put to the membership for ratification. In other words, the 3rd shift agreement was ratified first in May 1993, then once again in October 1993, as part of the general collective bargaining proposals and revisions.

75. Having reviewed the terms of the 3rd shift agreement, it is difficult to understand why those provisions have generated such acrimonious debate. I am unable to see any real “concessions” or adverse impact, and there is not much doubt that the resulting job creation was a positive benefit for the membership. However, for present purposes, it does not really matter whether, on balance, the agreement was beneficial or not. Nor does it matter whether the objectors’ concerns about its terms are valid or not, or whether, as they suggest, the agreement could have been better, or the process would have benefited from more debate. The issue I must decide is whether there has been a breach of section 69 of the Act, and I am satisfied that there has been no violation.

76. The negotiation and ratification of the 3rd shift agreement was consistent with past local practice. There was adequate notice of the proposed ratification vote, adequate notice of the contents of the proposal, and adequate opportunity for members to register their preference. Likewise, there was adequate notice for the objectors to frame their opposition.

77. No doubt there was an element of political maneuvering. I am told there always is in this local. But there was no breach of the *Labour Relations Act*. The local union was not “arbitrary” “discriminatory” or acting “in bad faith” in representing employees of the unit.

78. I should add that even if I had concluded that there was some impropriety (*which I expressly do not*) it would not have been appropriate to set aside an agreement that was entered into by the company in good faith, that was ratified by a substantial majority of employees at the time, and that was confirmed as part of the 1993 master bargaining. The company has not breached section 69 of the Act, and should not be deprived of the benefits of the agreement. Nor should the employees who have been employed in accordance with its terms.

79. There remain Ms. Green’s allegations of intimidation, which can be addressed relatively briefly.

VI - The Later Allegations

80. The allegations against the union concern the way in which some of its officials responded to the attack on their integrity by others - in this proceeding, in a media interview about this proceeding, and within the local union itself. In the course of this exchange, the partisans traded insults about each others’ conduct, of the kind to which I have already referred. It was said, for example, that Ms. Green’s complaint (with which other objectors were associated) was designed to undermine the 3rd shift agreement - which was in fact its stated purpose at the time it was filed - and that it was wrong for the objectors to attack the union before the Board. Ms. Green asserts that the objectors were the subject of attack because they were supporting her complaint.

81. However, I see no purpose in reviewing the exchange of allegations here. I am satisfied that none of this mud-slinging falls within the ambit of section 82, however characteristic it may be of the relationship between Local 222 “politicians”. There is, for example, no connection between a scuffle involving Mr. Kozac at the Royal York Hotel in September 1993, and the fact that Mr. Kozac and Mr. Drinkwalter were participants in these proceedings.

82. The same can be said about certain communications from the company to various union officials. I am satisfied that these letters reflected *bone fide* employer concerns (unauthorized employee absences and inflammatory comments in a union newspaper) and were not intended to pressure witnesses or the participants in these proceedings.

83. Ms. Green’s allegations in this regard are without foundation.

VII

84. There is no doubt that Ms. Green *believes* that Local 222 is “riddled with corruption from top to bottom” (her words). Ms. Green is inclined to view the company’s behaviour in the same cynical light. And there is not much doubt that the local is plagued by “political” wrangling. But there is no foundation for this complaint.

85. The complaint is therefore dismissed.

2236-93-R United Steelworkers of America, Applicant v. Ken Bodnar Enterprises Inc., Responding Party v. Group of Employees, Objectors

Bargaining Unit - Certification - Constitutional Law - Charter of Rights and Freedoms - Employee - Membership Evidence - Board determining that section 8(4) of the Act not violating freedoms of expression, association and right to equal treatment set out in Charter - Board dismissing employees' objections to validity of trade union's membership evidence - Board finding union's proposed "all employee" unit appropriate and rejecting employer's assertion that the retail and service components of its business so distinct that employees in those components not sharing community of interests - Board finding "hardware department manager" to be "employee" within meaning of the Act - Certificate issuing

BEFORE: *Roman Stoykewych*, Vice-Chair.

APPEARANCES: *Marie Kelly and Alison Morgan-Coldrick* for the applicant; *Elizabeth Keenan, David C. Daniels and Ken H. Bodnar* for the responding party; *C. J. Abbass, Linda Morby, Shirley Martin, Stefan Kopacz and Rosemary Turner* for the objectors.

DECISION OF THE BOARD; June 21, 1994

1. This is an application for certification, in which the applicant trade union sought to represent employees of the responding party employer, which operates a "Canadian Tire" outlet in Collingwood, Ontario. Hearings in this matter commenced on November 1, 1993 and continued for numerous days until their completion on December 17, 1993. In a decision dated December 24, 1993, the Board granted the applicant a certificate. During the course of the proceedings, I issued "bottom line" rulings, with further reasons to follow, with respect to a number of issues raised both by the responding party and by the intervenor employees. The following are those further written reasons.

Constitutional Issues

2. The trade union filed its application for certification of the employees of the respondent on October 1, 1993. Some days after the application for certification was filed, a number of employees who had previously indicated their willingness to be represented by the applicant by signing union cards during the course of the trade union organizing campaign advised the Board in writing that they now sought to have their applications for membership in the trade union revoked. A number of reasons were advanced for doing so, some of which will be discussed below in the context of the allegations of defective membership evidence. However, for the purposes of the constitutional argument it was the basic thrust of the employees' representations that their "changes of heart" ought to be considered by the Board and that their previous indication of support for the trade union ought to be ignored for the purpose of ascertaining the level of support for the trade union. The representations of each of the employees correctly assumed that, in the ordinary course, the Board would not consider such evidence by virtue of operation of section 8(4) of the Act. That section, which came into effect on January 1, 1993, provides as follows:

8(4) The Board shall not consider the following evidence if it is filed or presented after the certification application date:

1. Evidence that an employee is a member of a trade union, has applied to become a member of a trade union or has otherwise expressed a desire to be represented by a trade union.

2. Evidence that an employee who had become or had applied to become a member of a trade union has cancelled, revoked or resigned his or her membership or application for membership or has otherwise expressed a desire not to be represented by a trade union.
3. Evidence that an employee who had become or who had applied to become a member of a trade union has done anything described in paragraph 2, but has subsequently changed his or her mind by becoming a member again, by reapplying for membership or by otherwise expressing a desire to be represented by a trade union.

3. Counsel for the objecting employees took the position that the provisions of section 8(4) of the Act were inconsistent with the requirements of sections 2(b), 2(d) and 15 of the *Canadian Charter of Rights and Freedoms*. In particular, it was asserted that section 8(4), insofar as it precludes the Board from considering evidence expressing a desire by employees not to be represented by a trade union submitted to the Board after the date upon which the trade union applies for certification, is violative of the freedoms of expression, association and the right to equal treatment as set out in the *Charter*. As indicated in my oral ruling rendered during the proceedings on November 3, 1993, I found the position of the employees on these issues to be without merit and declined to direct the remedies that they sought. The following are my reasons for doing so.

4. Regarding the issue of freedom of expression, Mr. Abbass argued that the effect of section 8(4) was to deny an effective method of expression concerning the issue of whether employees should be represented by a trade union. Prior to the amendment coming into effect, it was contended, expression had been facilitated by the Board's practise of setting a terminal date for receipt of expressions of desire to revoke union membership at a time subsequent to the application date. Notice would be provided to all employees and the employer, and because it remained open for employees to retract their support for the trade union, employees opposed to unionization were allowed the opportunity to convince those employees who had signed trade union membership cards to retract their support for the trade union. The effect of the operation of section 8(4) is to remove what was characterized as a forum of expression. Although counsel conceded that employees were still able to discuss that issue irrespective of the operation of section 8(4), nonetheless, he stressed that the provision had the effect of rendering such speech essentially meaningless because employees could not address the issue of certification. Counsel relied primarily upon certain *dicta* set out in *Attorney-General of Quebec v. Irwin Toy Ltd. et al.* (1989), 58 D.L.R. (4th) 577 and the dissenting decision in *Pinkerton's of Canada Ltd.*, [1990] OLRB Rep. Jun. 673 in support of the position that the freedom of expression must be meaningful in practical terms. As a remedy, counsel requested that the Board declare the provisions of section 8(4) to be without effect, and to extend the terminal date for receipt of evidence revoking union membership beyond the application date to permit employees wishing to withdraw their support for the trade union to be able to do so.

5. The scope of activity that is protected by the provisions of section 2(b) of the Charter is substantial, extending potentially to all activity that "attempts to convey meaning". (*Irwin Toy, supra.*) Under this broad formulation, it may well be that the restriction of an opportunity to express a point of view at a proceeding, even if that constraint is effected by procedural means, is sufficient to constitute a restriction of the expression rights under the *Charter*. (See, for example, *Dairy Producers Co-operative Ltd. v. Teamsters, Dairy & Produce Workers, Local 834* (1992), 5 Admin. L.R. (2d) 212 (Sask. Q.B.)). However, having regard to the legislative objectives underlying the provisions of section 8(4) of the Act, and to the means chosen to achieve those objectives, it is not necessary for me to decide that difficult question since I am satisfied that any restrictions of expression rights are "reasonable limits" pursuant to section 1 of the *Charter*. (*R. v. Oakes*, [1986] 1 S.C.R. 103; *Irwin Toy, supra.*) In this regard, I am satisfied that the legislative objective underlying

ing the legislation is sufficiently pressing and substantial so as to justify a curtailment of the expression rights at issue. As was extensively reviewed in *Hemlo Gold Mines Inc.* [1993] OLRB Rep. Mar. 158, the legislative changes set out in section 8(4) of the Act were responsive to the protracted and divisive litigation arising from the Board's requirement to examine the voluntariness of post-application date petitions. Prior to the amendments coming into effect, employers and employees would be given notice of the union's application for certification at a point in the process in which the proportion of support for the union amongst the employees was a live issue. This had the effect of creating a substantial incentive and opportunity for illicit employer support for "petitioners" seeking to rescind their trade union membership. The Board's *Reports* are replete with cases in which the issue of the proportion of trade union support required a determination as to whether post-application date petitions were tainted by employer support, whether real or perceived. Almost invariably, the litigation of such issues involved the resolution of difficult questions of credibility framed in the context of mutual recrimination and allegations of misconduct. Not only did such litigation have the effect of making the otherwise simple administrative task of ascertaining the proportion of trade union support amongst the employees into an arduous process extending over months and sometimes years, it also served to sour if not poison working relationships for years to come, regardless of the outcome of the proceeding. Bearing this in mind, I am satisfied that the legislative changes are responsive to a pressing labour relations problem.

6. Furthermore, having regard to the criteria set out in *Edwards Books & Art Ltd.*, [1986] 2 S.C.R. 713 and *Irwin Toy*, *supra*, I am satisfied that the means chosen by the Legislature are "proportional" to the government's objective in that the limiting measure has a rational connection to the objective sought to be obtained, that the provision is the option least restrictive of those rights, and that the effect of the limitation does not trench upon expression rights so severely as to outweigh the legitimate government objective. First, I am satisfied that the legislation has a rational connection to the objective sought to be attained. The legislative response in Ontario was to restrict the development of the unfortunate labour relations dynamic described above by requiring the Board to ascertain both the number of employees in the bargaining unit and the number of employees who have applied to be members of the trade union seeking certification as of the date upon which the trade union filed its application for certification with the Board. The principal effect of this is to render numerically irrelevant changes in support for the trade union, be they retractions or increments, that occur after the application date. For this reason, I am satisfied that the legislation, as it is drafted, makes post-application anti-union campaigns superfluous to the count. It is to be noted that this legislative approach is in line with that already taken in several other jurisdictions in Canada, including the federal jurisdiction, Saskatchewan, Manitoba and Newfoundland. The experience of our sister tribunals with similar legislation confirms my view that the legislation in fact achieves its desired effect. In particular, the Board notes the comments of the Canada Labour Relations Board in *Canadian Imperial Bank of Commerce, Sioux Lookout*, [1979] Can. LRBR 18, that the choice of the application date as the relevant time of calculation of quantum of membership support both reduces the delays in the certification process attendant to the litigation of post-hearing petitions and reduces the opportunity for illicit employer interference in the certification process.

7. Furthermore, I find that the provisions of section 8(4) are not unduly restrictive of expression rights in the course of achieving their purpose. Notwithstanding the provisions of section 8(4), employees remain free to retract their support for the trade union and to have that retraction considered by the Board provided, of course, that they notify the Board of their decision prior to the time that the trade union files its application for certification at the Board. (Section 8(7)(c)) Employees also remain able to challenge the validity of membership evidence advanced in their name on the basis of fraud and misrepresentation. (Section 8(7)(a)). Moreover, the

impugned provision does nothing to affect employees' legal rights to participate in any other aspect of the certification proceedings or to otherwise exercise any rights under the *Labour Relations Act*.

8. Lastly, I am satisfied that the provisions of the impugned section do not so seriously constrain expression rights as to outweigh the importance of the labour relations objectives sought to be attained. The changes effected by section 8(4) are essentially procedural ones that regulate the time and place, rather than the content, of the expressive activity and, as indicated above, the restriction of expression rights, if such is to be case, is minimal, since employees remain free to discuss and consider the entire range of issues relating to union membership. Nor is there a question of employees who oppose the trade union being denied an opportunity to express their views since, by virtue of not signing an application for union membership, such employees are deemed to oppose the trade union for purposes of the count. Rather, the effect of the provision is merely to alter the date upon which trade union support is measured. In general, I am satisfied that the provisions of the section have little impact upon the expression rights at issue. It is possible, with sufficient ingenuity, to construe virtually any procedural change to be one that adversely affects expression rights, particularly when great emphasis is placed upon the effectiveness of that speech forwarding other substantive interests. However, I am not convinced that the essentially procedural changes effected by section 8(4) detrimentally affect the freedom to meaningful expression to such an extent as to outweigh the labour relations objectives sought to be attained. For these reasons, I dismissed the challenge to the validity of the section on the basis of freedom of expression.

9. Counsel also raised the argument that the provisions of section 8(4) are violative of the *Charter* freedom of association. Little argument was directed to this matter other than the submission that the Board's previous decision in *Hemlo Gold Mines Inc. supra* was incorrectly decided in holding that there was no such violation. Counsel asserted that the considerations of the panel in that decision over-emphasized the dangers of employer involvement in the certification process that the provision attempts to redress, and as a result, countenanced a system of forced association. Counsel relied upon *Lavigne v. Ontario Public Service Employees Union et al.* (1991), 4 C.R.R. (2d) 193 (S.C.C.) for the proposition that freedom of association includes a freedom from compelled association. As I indicated in my oral ruling, I am not persuaded that section 8(4) of the Act is violative of the freedom of association. Moreover, as I am wholly in agreement with the analysis and the conclusions of the Board in *Hemlo, supra*, it is unnecessary to review that decision's careful description of the purposes of the new certification processes associated with the legislative amendments. It is sufficient to note that I am in agreement that the views expressed therein that the *Lavigne, supra*, decision does not stand for the general proposition that freedom of association includes a freedom from compelled association, nor am I persuaded that the broad interpretation of freedom of association adopted by the employees in the present application is consistent with the relatively narrow interpretation given to the term by the Supreme Court of Canada in such decisions as *Professional Institute of the Public Service of Canada v. N.W.T. (Commissioner)*, (1990) 72 D.L.R. (4th) 1, *Reference Re Public Service Labour Relations Act, Labour Relations Act and Public Officers' Collective Bargaining Act*, (1987) 38 D.L.R. (4th) 161, *Public Service Alliance of Canada et al. v. The Queen in Right of Canada*, (1987) 38 D.L.R. (4th) 249, and *Government of Saskatchewan et al v. Retail, Wholesale and Department Store Union, Locals 544, 496, 635, & 955 et al.*, (1987) 38 D.L.R. (4th) 277. Finally, I am in agreement with the *Hemlo* decision insofar as it determines that, in any event, certification does not infringe the freedom of association because it does not compel employees to become members of a union.

10. Finally, counsel argued that the provisions of section 8(4) had a discriminatory effect upon his clients, and therefore, he asserted, were violative of the equality rights set out in the *Charter*. Counsel argued that the provisions of the impugned section created far greater rights for

those employees seeking to have a trade union represent them than for those who oppose it since the provision permits the trade union to select the deadline for the union organizing campaign. The effect of the statute is thus to prevent the exercise of what counsel characterized as the right to stage an anti-union campaign by those who oppose unionization to rally support for their views after the application date. Counsel described this as a wholly unreasonable imbalance of rights, and submitted that the actions of the Legislature were “overbroad” in its curtailment of such rights.

11. In my view, it is unnecessary to determine whether a particular disadvantage or inequality is accorded to the group of employees, be they characterized as those persons seeking to oppose a trade union or as those persons seeking to retract their support for a trade union, because the basis of their claim to equality is not one that is recognized under the provisions of the *Charter*. Since the decision of the Supreme Court of Canada in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, it is abundantly clear that questions of inequality are addressed under the *Charter* only when the claim of unequal treatment is one that is based upon grounds specifically set out in section 15, or when the claim is based on “analogous grounds”. In respect of the latter, the Supreme Court has stated that the analogous grounds advanced must involve “immutable personal characteristics.” (*Andrews, supra.*) I am satisfied that the group seeking to invoke section 15 of the *Charter* in the present application, as characterized above, is neither one that is enumerated under the *Charter* nor one that is analogous to such a group. I do not accept that opposition to a trade union or especially a wish to retract support for a trade union is an “immutable characteristic” as understood in *Andrews, supra.* Accordingly, for these reasons, I find that the equality provisions of the *Charter* have no application to the present matter.

Alleged Defects in the Membership Evidence

12. By correspondence dated October 12, 1993 directed to the Board from counsel for several employees, it was alleged that the membership evidence submitted by the trade union in support of the certification was defective in two basic respects. First, it was asserted that Linda Morby, who works for the responding party employer, and had signed a membership card during the trade union organizing drive, subsequently requested that her card be returned to her and not be used in the calculation of support for the trade union for the purposes of the certification application. It was alleged that such request was not honoured by the applicant. The trade union denied that Ms. Morby requested that her card be withdrawn, and sought to rely upon the membership evidence that it submitted bearing her name and signature. Secondly, in the same correspondence, it was asserted that Shirley Martin, Rosemary Turner and Stephan Kopacz, each of whom are employed by the responding party employer and had signed membership cards, were assured by a union organizer or organizers that a representation vote would be held irrespective of the number of cards that the trade union collected during its drive. Counsel for the employees sought as a remedy that the cards in question not be considered for the purposes of the count and that the Board order a representation vote. The union denied making any statements that would induce employees to believe that there would be a vote, and, subject to the establishment of support in excess of 55% of the employees in the bargaining unit, sought certification without the requirement of a vote.

13. After hearing several days of evidence and submissions, I ruled orally on December 9, 1993 that the objections with respect to the defective membership evidence were groundless and that there was no reason for the membership evidence of the employees in question to be rejected for the purposes of the count. The following are my reasons for so ruling.

14. Near the very commencement of the applicant’s organizing drive, on September 9, 1993, Bill Keen, who is a mechanic with the employer and the principal “in-store organizer” of the

applicant, approached Linda Morby, the respondent party employer's "Sports Manager", with respect to meeting with a trade union representative. Ms. Morby expressed interest in the campaign, and attended at a meeting the next day with Mr. Keen and Allison Morgan-Coldrick, a full-time organizer employed by the applicant trade union. It appears that the substantial majority of the conversation at the meeting took place between Ms. Morgan-Coldrick and Ms. Morby, during which they discussed the advantages of unionization and, more extensively, Ms. Morgan-Coldrick outlined the process by which the union's bargaining rights were to be obtained. Ms. Morgan-Coldrick, who is an experienced union organizer, testified that the presentation given to Ms. Morby was one that she routinely delivered to employees she meets during the course of organizing drives (she referred to it as her "spiel"). For the present purposes, it is important to note that her "spiel" featured a review of the rudiments of the certification procedure, including a statement that it was the policy of the trade union, when organizing, to apply for "automatic certification", i.e., by applying when more than 55% of the cards were obtained and thereby avoiding the requirement of a representation vote. Ms. Morby expressed considerable interest in a trade union, particularly since she had not received a wage increase for what in her view was an inordinate amount of time, and agreed to sign an application for membership card. In addition, she agreed to identify for Ms. Morgan-Coldrick those employees of the respondent who in her view would be likely union supporters. Nevertheless, she advised Ms. Morgan-Coldrick that she did not wish to be identified publicly as a union supporter. She was duly provided an assurance that the trade union would not divulge her support to anyone, and left after obtaining several blank union membership cards which, it appears, she had intended to distribute to other employees.

15. According to Ms. Morby's testimony, she reconsidered her involvement in the trade union virtually immediately. It appears that within a day of her first meeting with Ms. Morgan-Coldrick, Ms. Morby was advised by the employer that she was being considered for a promotion to a higher level position that, in her view, was managerial. Accordingly, it was claimed, she asked Bill Keen on September 12 to withdraw her card for purposes of the certification application. However, the evidence surrounding this alleged transaction, especially Ms. Morby's own testimony, does little to support such an assertion. On September 12, 1993, Ms. Morby was visited at her home by Bill Keen. Mr. Keen had arrived at her home in order to sign up Stephan Kopacz, with whom Ms. Morby was living as a partner. According to Ms. Morby, she at that point advised Mr. Keen that she "doesn't want to be involved in the union anymore" and that Mr. Keen responded by saying "Fine, I'll take care of it". She claims that in so advising Mr. Keen, she intended him to return her card or at least ensure that her name would not be used by the union for the purposes of the certification process. Mr. Keen denies both that Ms. Morby made the statement she claims to have made or that he intimated to her that he would "take care" of anything. By his account, there was a general conversation about the trade union drive. By contrast to both these versions of events, it was the evidence of Mr. Kopacz, who at the time of the conversation was rushing to get ready for work and was present for only a small portion of the conversation between Ms. Morby and Mr. Keen, that Ms. Morby not only advised Mr. Keen that she no longer wanted to support the union but also specifically asked that her card be returned. As noted, Ms. Morby made no such claim in her evidence, and indeed, in cross-examination, expressly denied asking for her card back.

16. It was Mr. Kopacz's evidence that, given that he was in a great rush to get to work, he was able to speak with Mr. Keen only briefly. He testified that, despite hearing from Ms. Morby that she no longer wished to support the union, he nonetheless agreed to sign a union card. Mr. Kopacz claims that he signed a card only after Mr. Keen assured him that there would be a vote amongst the employees on the issue of certification. In his testimony, Mr. Kopacz claimed that he signed the card on that specific understanding. Mr. Keen denied informing Mr. Kopacz that there would be a vote. It was his evidence that although he engaged in general conversation about what he felt were the merits of unionization at the workplace, it was apparent to everyone, not the least

to himself, that he knew very little of the specifics of the certification process. As he somewhat sardonically noted in his evidence: "I'm a great mechanic, but I don't know anything about the law". Given his manifest limitations in this latter respect, it was his practice to advise all employees whom he encountered in the context of his organizing to contact Ms. Morgan-Coldrick in order that she may be able to answer any questions they might have. It was his evidence that he so advised Mr. Kopacz. In any event, he assumed, quite understandably, that Mr. Kopacz had spoken to Ms. Morby about the organizing campaign and its procedures and would therefore be familiar with the union's strategy. Mr. Keen left the Morby-Kopacz residence shortly after obtaining Mr. Kopacz's signature.

17. Ms. Morgan-Coldrick further contacted Ms. Morby by telephone on the evening of September 15, 1993. At the hearing, submissions were made by Ms. Morby's counsel that, once again, she requested that her card be returned to her. However, Ms. Morby's evidence, even if it were to be believed in its entirety, does not support that position. The telephone conversation was extremely short, since at the time, Ms. Morby was at home entertaining several persons that, in her view, were managerial personnel at the store. Although there was some disagreement as to the exact words that were used in the telephone conversation, there is no dispute that Ms. Morby advised Ms. Morgan-Coldrick that she no longer wished to be involved in the trade union drive. Similarly, there is no real dispute that Ms. Morby did *not* specifically ask that her card be returned or that it not be relied upon by the trade union during this conversation or at any other time. Nevertheless, Ms. Morby insisted that, under the circumstances, it was plain that she was asking the union to withdraw her card.

18. The Board also heard the evidence of Shirley Martin, who has the title of "Manager, Hardware" at the Collingwood store. Ms. Martin testified that she was approached at her home by Bill Keen on September 27, 1993, at which time he asked her to sign a union membership card. She claimed that Mr. Keen indicated to her that he had already signed 75% of the employees in the store and that her card in this respect was "just gravy". She also asserted that Mr. Keen provided her with certain information as to the process by which certification was to be obtained, which, she maintains, included a statement that there was to be a vote amongst the employees. Although it was her evidence that, at the end of the conversation it was her belief that there would be a vote, she candidly stated that what impressed her most was how little Mr. Keen appeared to know about the process. Mr. Keen admitted as much during the course of their conversation, and, as was his practise, encouraged her to speak with Ms. Morgan-Coldrick by telephone. He provided Ms. Martin with Ms. Morgan-Coldrick's telephone number. Ms. Martin immediately contacted Ms. Morgan-Coldrick, discussed the union organizing drive, and then signed a union card provided to her by Mr. Keen. It was Ms. Martin's evidence that although she asked Ms. Morgan-Coldrick questions about the drive and the process, she neither asked about a vote nor was advised that the union was planning to proceed without a vote amongst the employees. Ms. Morgan-Coldrick, on the other hand, testified that during her telephone conversation with Ms. Martin she provided her usual "spiel" that, as discussed above, included reference to the union's strategy to proceed by way of automatic certification.

19. Having reviewed the evidence, I am satisfied that none of the employees' claims with respect to the defective membership are of sufficient weight so as to cause the Board to disregard or question such evidence or to otherwise exercise its discretion to order a vote. It should be noted that with respect to Ms. Morby, the applicant conceded that it was its practice to return cards upon request and that, were she to have requested the return of her card, it would not be appropriate for the Board to consider her card for the purposes of the count. However, the evidence does not support the allegation that she requested the union to return her card or to otherwise not use her card for the purposes of the application for certification. As indicated above, it was conceded by Ms.

Morby that she never specifically asked that either Ms. Morgan-Coldrick or Mr. Keen return her card. Similarly, the evidence that Ms. Morby alluded to the possible withdrawal of her support for the purposes of the membership count is exceedingly weak. As for Mr. Kopacz's claim that she did so, this evidence is directly contradicted by Ms. Morby herself. At its highest, then, the evidence of her alleged statements that she no longer wished to be involved in the union is ambiguous, and under the circumstances, could be reasonably interpreted by both Ms. Morgan-Coldrick and Mr. Keen to mean that she no longer wished to pursue her previously active role in the organizing drive. It is important to note that the purpose of the membership evidence was made clear to Ms. Morby, and that consequently, she would be aware of the significance of the formality involved in the requirement that the card be signed. In this respect, it is reasonable to expect that a request for revocation would be correspondingly formal, and certainly would take more substantial a form than the statement that she no longer wished to be further involved in the union. Accordingly, even if Ms. Morby's evidence is to be believed in its entirety, I am satisfied that she did not make her intentions known with sufficient clarity to require the trade union to act upon them.

20. There is, in any event, substantial reason to doubt that Ms. Morby intended to request the return of her card prior to the October 1, 1993 application date. Ms. Morby attempted no further contact with trade union representatives after her telephone conversation of September 15, 1993 with Ms. Morgan-Coldrick. She claims that she was under the impression that she had advised the trade union to withdraw her card and that the trade union had acceded to her request. In this vein, it was her evidence that she was surprised to receive promotional literature from the trade union dated October 15, 1993, in which it was made clear that the trade union considered her a member. However, her actions are not consistent with her profession of surprise. The evidence is clear that, prior to October 15, 1993, she found it appropriate to approach Mr. Abbass, at which time he was instructed to take the position that Ms. Morby was "concerned" that her card was still being used. More generally, Ms. Morby's evidence was inconsistent on many points, and in particular, by her counsel's own admission, attempted to deceive the Board when questioned about receiving payments from the employer for her hotel accommodations during the course of these proceedings. Under these circumstances, I have little hesitation in rejecting Ms. Morby's assertions that she intended to instruct representatives of the union to return her card, or that she took any action in that respect and, to the extent that her evidence differs from that of Mr. Keen and Ms. Morgan-Coldrick, I prefer the evidence of the latter two witnesses.

21. Both Mr. Kopacz and Ms. Martin assert that they were misinformed by the union with respect to its intention to pursue the certification application on an "automatic" basis. In this respect they rely, in whole or in part, upon the statements allegedly made to them by Bill Keen, an "in-store", volunteer organizer characterized by Ms. Martin as conspicuously ill-informed as to the basics of the certification process. Mr. Keen offered both Mr. Kopacz and Ms. Martin the assistance of Ms. Morgan-Coldrick. Mr. Kopacz declined to inquire further, while Ms. Martin asserts that, despite contacting the union organizer, the topic of the vote was not raised. Assuming, but by no means deciding, that Mr. Keen made the statements as alleged, I am satisfied that under the circumstances any reliance placed such statements would be entirely unreasonable. The Board has made it clear in numerous decisions that although it may question or disregard membership evidence induced by the misrepresentations of responsible trade union officials (*Carleton University*, [1976] OLRB Rep. Aug. 450), it will carefully scrutinize the claims of reliance placed upon the statements made by unpaid, "rank-and-file" organizers. Thus, in the absence of evidence of physical intimidation or threats to job security, alleged misrepresentations made by rank-and-file organizers will not normally affect the validity of the membership evidence. (*Leon's Furniture*, [1982] OLRB Rep. Mar. 404; *General Motors*, [1980] OLRB Rep. Oct. 1437). For example, in *General Motors*, *supra*, the Board found that unequivocal and unfounded representations made by rank-and-file organizers that the union would proceed by way of a representation vote was insufficient

to invalidate the membership evidence put forward by the union. In coming to that conclusion, the Board declined to place great weight upon statements made by one employee to another, on a subject in which neither of them was expert, particularly when the recipient of the statement had every opportunity to check the statement's accuracy.

22. The considerations in *General Motors, supra*, are particularly pertinent to the present application. Mr. Kopacz had ample opportunity to inquire further with respect to the union's intentions, both from Ms. Morgan-Coldrick, and from Ms. Morby, but declined to do so. Instead, if his evidence is to be believed, he relied upon the statement of a fellow worker, in a hasty conversation whose details are not otherwise recalled, concerning a matter about which both of them were obviously ill-informed. Ms. Martin, for her part, took the further step of contacting Ms. Morgan-Coldrick, but claims that the issue of the vote did not arise in that latter conversation. It appears that, notwithstanding her contention that the issue of the representation vote was fundamental to her decision to sign the card, she nonetheless declined to inquire about it with the abundantly knowledgeable union representative but chose instead to rely upon the statement of a fellow-employee whom she recognized as unenlightened as to the workings of the certification process. In neither case is the reliance upon Mr. Keen's alleged statement a reasonable one. Accordingly, I am satisfied that the statements allegedly made by Mr. Keen do not affect the weight to be given to the membership evidence and thus, I find that the cards submitted by the trade union on their behalf constitutes valid membership evidence for the purposes of the count.

23. Finally, there was reference in the evidence that Rosemary Turner, who also works at the Canadian Tire Store, was advised by Ms. Morgan-Coldrick that a vote would be held prior to certification. Ms. Turner did not appear as a witness in the present proceeding. It was the evidence of Ms. Morgan-Coldrick that she spoke to Ms. Turner by telephone during which time she delivered her "spiel" that, as was her practice, included reference to the trade union's intention to proceed by way of automatic certification. At that point, according to Ms. Morgan-Coldrick, Ms. Turner told her that she had already made up her mind and that she was going to sign a union card. In light of the evidence of Ms. Morgan-Coldrick, whom I find to be a credible witness, and noting the failure of Ms. Turner to appear as a witness, I find that Rosemary Turner was advised that the trade union was intending to proceed by way of automatic certification and was not otherwise misinformed with respect to its intention as to a representation vote.

24. Accordingly, for these reasons, I dismissed the employees' objections to the validity of the trade union's membership evidence.

Appropriateness of the Bargaining Unit

25. In its application the trade union sought certification for the following unit of employees:

All employees of the responding party carrying on business as Canadian Tire Associate Store in the Town of Collingwood, save and except Store Manager, Service Manager, persons above the rank of Store Manager, Service Manager, head cashier, bookkeeper and gas bar attendants.

The responding party employer took the position that the proposed "all employee unit" was inappropriate. It was asserted in this respect that the functions and operation of the two aspects of the employer's business, namely, the retail and service components, were so distinct that the employees within those components would not share a sufficient community of interest so as to form a coherent grouping for the purposes of collective bargaining. It was contended that this would render the proposed all employee unit inappropriate.

26. Although the parties had agreed upon a substantial portion of the facts relating to the bargaining unit issue, a number of factual questions remained unresolved. However, in light of the respective positions of the parties, as put before me in their submissions, I determined that it was unnecessary to resolve any of the remaining factual issues since I was persuaded that the unit was appropriate even if the employer's assertions of fact were accepted in their totality. The following are my reasons for so ruling.

27. It was at the core of the employer's position that the approximately six mechanics employed in the respondent's service department performed their duties in a substantially independent and unrelated manner to those employees who worked as clerks in the retail section of the "Canadian Tire Store" and for this reason, should be required to bargain separately. In this respect, it was asserted that the employees worked under distinct supervision, performed work which required different skills, received payment upon a different basis, had different arrangements with respect to the company's profit sharing, and that a greater amount of part-time work was performed in the service department. Moreover it was asserted that there was little interchange amongst the respective groups of employees, although here it was conceded that, on occasion, minor maintenance work and other similar functions were performed by maintenance employees in the retail section of the store, that certain "parts" functions were performed by the same personnel for both sections of the store, and that certain employees working in the retail section of the store work as service advisors on a relief basis. Finally, it was asserted that the two aspects of the operation, although housed in the same building and appearing to the public as a single "Canadian Tire", were administered separately from an accounting perspective, and that, for example, services performed by the mechanics would be charged against the accounts of the retail section were they to be required to be performed there.

28. In applications for certification, the Board is required to determine whether the unit sought by the applicant constitutes "an appropriate unit" for collective bargaining purposes. The Board has made it clear that the discretion accorded it in this respect does not require it to find a uniquely appropriate unit but that instead, a plurality of bargaining units are potentially appropriate. The Board has held that the range of potential appropriate units is broad, and particularly in recent years, has placed considerably less reliance upon alleged divergences in interest amongst employees in the course of bargaining unit determination. As a result, the Board has frequently certified groups of employees with widely divergent education, skills and employment conditions. Its experience in this regard is that such groups can bargain together collectively in a satisfactory manner. Indeed, the Board in recent years has rarely, if ever, rejected a bargaining unit proposed by the applicant solely on the basis that the employees within it did not share a sufficient community of interest but has focused instead on the potential of labour relations problems that might be encountered by the employer. With that in mind, the "simple question" the Board now asks in the course of determining the appropriateness of a bargaining unit is:

does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis without at the same time causing serious labour relations problems for the employer. (*Hospital for Sick Children*, [1985] OLRB Rep. Feb. 266.)

29. One of the principal considerations of the Board in its inquiries over the last decade is the extent to which the unit proposed by the union would facilitate bargaining structures that are likely to be effective and stable in the long-term. In this respect, subject to the requirement that bargaining units be such that they would not impede the ability of trade unions to organize, the Board has expressed a decided preference for broader-based bargaining structures that minimize the fragmentation entailed by a multiplicity of bargaining units. (*Board of Governors of Ryerson Polytechnical Institute*, [1984] OLRB Rep. Feb. 371, *Kidd Creek Mines Ltd.*, [1984] OLRB Rep.

March 481 and *Hospital for Sick Children, supra.*) This preference, moreover, is fortified by the recent amendments to the Act, which can be seen to articulate a legislative policy favouring more inclusive, broadly-based bargaining units that, at the same time, do not adversely affect employees' right to organization and participation in collective bargaining. Thus, section 6(2.1) of the Act has the effect of reversing the Board's policy of separate bargaining units for full-time and part-time workers in favour of the more inclusive, mixed units. Similarly, Section 7 of the Act now permits the Board to combine two or more bargaining units consisting of employees of the same employer and represented by the same trade union into a single, comprehensive unit.

30. Bearing in mind this policy preference, the Board has recently stated that, where there is a dispute as to the appropriateness of the bargaining unit, the broader, more comprehensive unit is "presumptively appropriate" where the union applies for that unit:

In other words, if a trade union seeks a more comprehensive bargaining unit, this larger unit will usually be appropriate, and will very likely be accepted on the *Hospital for Sick Children* test, unless there are serious labour relations problems which *demonstrably* overwhelm the difficulties associated with fragmentation, or unless the larger unit applied for seems idiosyncratic or perverse. Indeed, unless the labour relations context is quite unusual, one would expect the more comprehensive unit to be presumptively appropriate, if that is what the union has organized and applied for... (*The Governing Council of the Salvation Army in Canada and Bermuda*, [1994] OLRB Rep. Jan. 85.)

The Board in that case concluded that absent the exceptional circumstances it described in the passage cited above, it served no purpose to engage in the elaborate, time-consuming and expensive litigation involved in a bargaining unit determination where the applicant had proposed the more comprehensive unit. (*Salvation Army, supra*, para. 21.)

31. The "all employees" unit sought by the applicant in the present application, aside from being the most inclusive unit available, is a basic labour relations concept within the framework of the legislation. Furthermore, the labour relations context in the present application is entirely unexceptional. Under these circumstances, it is difficult to see what possible labour relations purpose could be pursued by further litigating the bargaining unit issue. The employer's evidence, even were it to be accepted in its totality, exhibits nothing in the way of unusual labour relations circumstances. As indicated above, the Board has found that groups of employees with substantial differences in working conditions and skill levels can bargain together successfully, and certainly nothing in the proposed evidence of the responding party would lead the Board to the conclusion that such would not be the case in the present circumstances. Moreover, the proposed evidence falls far short of demonstrating that the fragmentation that would ensue from the bargaining structure proposed by the employer would be outweighed by potential labour relations problems. The employer is proposing a bargaining structure along what are in effect "craft" lines, and would require a separate bargaining unit for six employees. The problems involved in such fragmentation are apparent. In the face of this, the employer did not seriously argue that labour relations difficulties, other than a projected increase in the bargaining power of the union would ensue from an acceptance of the more comprehensive unit. Accordingly, I am satisfied that nothing that the employer asserts would cause the Board to question the appropriateness of the bargaining unit advanced by the applicant. For these reasons, I found that the "all employees" unit sought by the applicant is appropriate for the purposes of collective bargaining.

Employee Status Issues

32. Evidence and submissions were entertained concerning the duties and responsibilities of Shirley Martin, who bears the title of "Manager, Hardware Department" at the Collingwood store. It was the employer's position that Ms. Martin performed duties of a managerial nature, and

as such, could not be considered an “employee” for the purposes of the Act, and, more particularly, the membership evidence submitted on her behalf by the trade union ought not to be considered in assessing the proportion of the union’s membership support. Given that the employee status of several persons, including Ms. Martin, were relevant to the trade union being able to establish its right to certification without a vote, I determined that it would be appropriate to hear and determine the status of these persons until such time as the question of the union’s right to automatic certification was resolved.

33. At the conclusion of the evidence and submissions concerning Ms. Martin’s employee status, I ruled orally that her duties were not such as to exclude her from the definition of “employee” in section 1(3) of the Act. Thereafter, the parties were able to reach further agreement with respect to outstanding issues such that a certificate issued on December 24, 1993. The following are the reasons for my ruling with respect to the “employee” status of Ms. Martin.

34. Ms. Martin has worked at the store for 12 years, the last two years in a position that bore the title “Manager, Hardware”. Previously, she had worked as a clerk in the Hardware Department. As her title suggests, her responsibilities generally extend to ensure the smooth functioning of the hardware department of the store, and includes the performance of supervisory duties over four full-time employees. There is no question that the work she performs is of a more responsible nature than the work performed by the clerks she supervises, that she operates with considerable autonomy, and she is paid at a commensurately higher hourly rate and enjoys a greater return in the employer’s profit sharing scheme than do the clerks she supervises. However, the question before the Board is not whether the duties performed are distinct or even qualitatively more important from those performed by other persons at the workplace, but rather, whether the duties that are actually performed are of such a nature as to preclude a person from enjoying “employee” status under the Act.

35. In its determinations regarding “employee” status, the Board pays particular attention to the challenged person’s authority to make decisions which may impact adversely upon other employees’ wages, benefits, or job security. Underlying this scrutiny is the concern that persons exercising substantial economic power over employees not be placed in a position where the exercise of that power would create a conflict of interest amongst the members of the bargaining unit. (*Transit Windsor*, [1991] OLRB Rep. April 565; *Hydro-Electric Commission of the Borough of Etobicoke*, [1981] OLRB Rep. Jan. 38.) In this respect, evidence of a person’s role in the process of hiring, firing, and disciplining employees is of especial significance to a determination whether a person is exercising functions so as not to be considered an “employee” for the purposes of the Act. Central to this analysis is whether the individual in question actually makes decisions or otherwise exercises an independent discretion with respect to matters relating to earnings levels or job security, and that in the process of doing so, the person exercises an “effective control” over employees. For this reason, the Board has long held that the mere conveyance of information to or from the employer, the routine performance of tasks requiring little in the way of independent exercise of discretion, or the coordination of efforts of other employees is not *per se* a “managerial function” as contemplated under section 1(3) of the Act. (*Borough of Etobicoke*, *supra*; *Oakwood Park Lodge*, [1982] OLRB Rep. Jan. 84.) Similarly, the making of recommendations with respect to decisions on such matters as hiring, firing, discipline and promotion are significant only if effectively followed by the person’s superiors. (*Oakwood Park Lodge*, *supra*.)

36. The evidence concerning Ms. Martin’s participation in the hiring process prior to the application date was not substantial. Although she claimed to have “hired” Rob Petropoulos some two years ago, from a review of the evidence taken as a whole it is clear that Mr. Petropoulos had previously worked in the store in a different capacity and that the process in which Ms. Martin was

involved is more accurately characterized as a lateral transfer. In any event, from the evidence of her participation in that process, it seems more reasonable to infer that, notwithstanding the fact that Ms. Martin expressed an opinion as to whether Mr. Petropoulos should work in the Hardware Department, the actual decision to do so was taken by Ms. Martin's superiors. Ms. Martin was not involved in the process of deciding whether to fill the position, she had no input into the level of wages that would be paid, the level of her consultation was at a relatively low level, and her subsequent attendance at a portion of the job interview appeared to consist only of informing Mr. Petropoulos of what his duties would be. Significant in this respect is that Ms. Martin made no evaluation of Mr. Petropoulos' appropriateness for the position, in that it appears that she was not aware whether he had performed satisfactorily in his previous position. Accordingly, I find that her role in the hiring process, if such it was, was so minimal, and the degree of discretion exercised so slight, as not to constitute a managerial function.

37. The only other evidence regarding her participation in a hiring decision was with respect to events occurring after the application date. Although I heard that evidence on the basis that it might be relevant to duties performed prior to that date, I am satisfied that no such basis of relevance has been established in the evidence. It was not seriously disputed by either counsel that the relevant date for establishing whether a person is performing the duties of an "employee" is the date of the trade union filing the application for certification, in this case, October 1, 1993, and that, as a result, the Board will normally look only to evidence of events taking place up to that date. (see, e.g., *Research Foods (1976) Limited* [1981] OLRB Rep. Mar. 309.) However, counsel for the employer argued that the evidence of Ms. Martin's participation in the post-application hiring process ought to be received by the Board in that it constituted evidence of a "trend" of an increasing authority that, although not required to be exercised prior to the application date, was equally real. However, the evidence does not support the inference of a "trend." As indicated above, Ms. Martin's sole participation in the "hiring process" during the two years prior to the application date consisted of a recommendation in the context of a lateral transfer, and a highly limited role in the resulting interview process. By contrast, the evidence of Ms. Martin's role with respect to the post-application hiring process was somewhat greater, and in particular, involved her conspicuously in the job interview procedure. While not deciding that her latter duties involved her in the performance of managerial functions, it is nonetheless clear that Ms. Martin was performing functions of a qualitatively different nature after the application date, and as such, it is not fair to infer that the work is illustrative either of a trend in that respect or of her purported "unexercised" managerial authority prior to the application date.

38. While Ms. Martin's job clearly gave her the responsibility of ensuring the smooth operation of the Hardware Department, and that this necessarily involved a supervisory function over the employees there, her role in the disciplinary process is negligible. Although the job description that claimed to represent her job duties appears to provide her ample authority over disciplinary matters, in fact, over the course of two years, her activities in this regard consisted of a single verbal warning given to an employee for consistent lateness and a direction to an employee to go home to "cool off" after an emotional flare up at work. In neither case did her actions have significant impact upon the employees' overall work situations. No formal records were kept of the verbal warning, and indeed, the employee's performance evaluation for that year, filled out by Ms. Martin, makes no reference to any such problem. Of even less effect was the direction to go home: it appears that the employee chose to ignore Ms. Martin's direction, and did his cooling off while at work. Similarly, Ms. Martin's role in the completion of performance reviews of the clerks over whom she exercised a supervisory capacity appeared to have little impact upon the employees concerned. The substantial majority of the evaluation form consists of a self-appraisal by the employee, and what little room for discretion there was allocated to Ms. Martin appears not to be exercised: as noted, despite complaining about an employee's performance, that concern did not

find its way onto the formal performance evaluation. Moreover, it is far from clear what effect, if any, an adverse report might have upon an employee's profit sharing apportionment, and beyond the handing of the completed forms to her superiors, Ms. Martin was unaware of what further processes transpired in this respect.

39. Finally, evidence was led with respect to scheduling functions performed by Ms. Martin. The evidence, which was not disputed, indicated that Ms. Martin was involved in the scheduling of work hours, vacations, and overtime opportunities, and that such scheduling was performed without considerable input from her superiors. In general, I find that the exercise of these functions, although involving some degree of discretion, was nonetheless performed within the rather narrow parameters of function required by the operation of the store, and as such, is more appropriately characterized as the coordination of function rather than the exercise of managerial authority.

40. In summary, then, the duties performed by Ms. Martin do not involve her in the exercise of managerial functions in that her role in the hiring, disciplinary and evaluation processes is minimal and has no substantial effect upon important job interests of the employees she supervises. Furthermore, I have found that the scheduling functions that she performs are primarily coordinative, rather than managerial. For these reasons, I found that Ms. Martin was an "employee" for the purposes of the Act.

0316-94-JD Ontario Secondary School Teachers' Federation, Applicant v. Kent County Board of Education and The Canadian Union of Public Employees, Local Union No. 2214, Responding Parties

Jurisdictional Dispute - Practice and Procedure - OSSTF alleging that work of occasional teachers being improperly assigned to "study room supervisors" represented by CUPE - Board rejecting CUPE's argument that Minister of Education having exclusive jurisdiction to resolve dispute involving alleged contravention of *Education Act* - Board not persuaded to exercise its discretion not to inquire into complaint because of greater expertise of alternative decision-maker - Board directing the filing of supplementary materials, including witness lists and detailed outline of evidence witnesses intend to give

BEFORE: *Russell G. Goodfellow*, Vice-Chair, and Board Members *S. C. Laing* and *B. L. Armstrong*.

APPEARANCES: *Ian J. Fellows*, *Ken H. Post* and *George J. Lung* for Ontario Secondary School Teachers' Federation; *Marisa Pollock*, *Laura Moore* and *Liz Byatt* for the Canadian Union of Public Employees, Local Union No. 2214; *Timothy P. Liznick*, *Jennifer Wootton-Regan*, *Mac Leitch* and *Paul Seagrave* for Kent County Board of Education.

DECISION OF THE BOARD; June 30, 1994

1. The title of proceedings is amended to describe the second responding party as: "The Canadian Union of Public Employees, Local Union No. 2214".

2. This is a complaint under section 93 of the *Labour Relations Act*.

3. The applicant OSSTF represents a unit consisting of the Kent County Board of Education's occasional teachers. The applicant alleges that the employer is improperly assigning work of occasional teachers to persons represented by CUPE, Local 2214.

4. The matter was scheduled for consultation in accordance with section 93(1.2) of the *Labour Relations Act* on June 14, 1994. At the outset of the consultation, the employer and CUPE made two arguments, both of which relate to the interpretation of the recognition clause of the OSSTF collective agreement and certain provisions of the *Education Act*, R.S.O., 1990 c. E.2.

5. Pursuant to Article 1.1 of the collective agreement, the OSSTF is the exclusive bargaining agent "for all Occasional Teachers employed by the Board in the secondary panel". Article 1.2 of the agreement provides that "Occasional Teacher" shall have the meaning given to it in the *Education Act*. The definition of occasional teacher in the *Education Act*, in turn, brings into play the definition of "Teacher" in that Act. "Teacher" is defined as "... a person who holds a valid certificate of qualification or a letter of understanding as a teacher in an elementary or secondary school in Ontario". The *Education Act* and the Regulations thereto also list the "duties of a teacher". Finally, section 262(1) provides that no one shall be employed or act as a teacher unless the person is qualified as prescribed by the Regulations. There is no suggestion that the persons to whom the work has been assigned, "study room supervisors" in the CUPE bargaining unit, are so qualified.

6. On the basis of the foregoing, the employer acknowledges that if study room supervisors are performing the *statutory* duties of a teacher, it would be in violation of the Act and would be required to terminate the work assignment. It is the employer's position however, that this is an issue which should be left to the Minister of Education to resolve through the exercise of the powers conferred by section 10 of the *Education Act*, which states:

10. The Minister may,

- (a) appoint such advisory or consultative bodies as may be considered necessary by the Minister from time to time;
- (b) appoint as a commission one or more persons, as the Minister considers expedient, to inquire into and report upon any school matter, and such commission has the powers of a commission under Part II of the *Public Inquiries Act*, which Part applies to such inquiry as if it were an inquiry under that Act;
- (c) submit a case on any question arising under this Act to the Divisional Court for opinion and decision.

7. CUPE relies on the same provision, but takes the argument a step further. It says that the real issue in this case is whether the employer is contravening the *Education Act*, and that this issue is within the exclusive jurisdiction of the Minister of Education to resolve.

8. The Board rejects both of these submissions. Dealing with the latter argument first, the Board's jurisdiction to deal with work assignment disputes is conferred by section 93 of the *Labour Relations Act*. In the language of that provision, the issue in this case is whether the "employer ... is assigning work to persons in a particular trade union [i.e. CUPE] rather than to persons in another [i.e. the OSSTF]": section 93(1)(b). The fact that the assignment may also constitute a violation of another statute does not deprive the Board of the jurisdiction conferred by section 93. Nor is there anything in the *Education Act* that purports to take that jurisdiction away.

9. With respect to the former argument, section 93(1.1) of the *Labour Relations Act* states:

93.-(1.1) The Board may consult with the parties affected by the complaint to resolve any matter raised by the complaint or may inquire into any matter raised by the complaint, or may do both.

Pursuant to this provision, the Board has a discretion as to whether to inquire into complaints concerning work assignments. Presumably, this discretion would include the right to decline to do so where, for example, the issues raised by the complaint may be more appropriately dealt with in another setting by another decision-maker with greater expertise.

10. That is not the case here. Section 10 of the *Education Act* empowers the Minister of Education to appoint such advisory or consultative bodies or commissions as he/she considers necessary or expedient. The Minister may also submit a case to the Divisional Court. However, there is no standing tribunal to deal with issues under the *Education Act* and there is nothing to suggest that the Minister would consider it appropriate to exercise the powers conferred by section 10 in this case, even assuming a request were made.

11. The issues raised by this complaint relate to the tasks being performed by a group of employees, and the relationship of those tasks to the work claimed by the OSSTF pursuant to the recognition clause of the collective agreement. These are the kinds of questions which the Board has both the authority and expertise to resolve under section 93 of the *Labour Relations Act*. The fact that this may require the Board to consider the provisions of another statute does not restrict its ability to resolve the jurisdictional dispute.

12. In this case, the applicant takes the position that the work in dispute goes beyond the definition of "teaching duties" in the *Education Act*. It claims the right to perform not only those duties but also certain ancillary duties which it alleges its members have traditionally performed. The employer and CUPE dispute not only the applicant's right to claim these ancillary duties, but also whether those or any statutorily defined "teaching duties" are *actually being performed* by study room supervisors.

13. Having regard to this factual dispute, the Board will inquire into all of the duties that the OSSTF claims the right to perform that it says are now being performed by the study room supervisors.

14. The parties have tentatively indicated a desire to call between sixteen and twenty-two witnesses. Given the mutual concerns of the Board and the parties for the expeditious resolution of this matter, and the Board's powers to both consult and inquire into the complaint, the Board hereby directs the applicant to file with the Board and the other parties a list of the various tasks it claims that its members have the exclusive right to perform and which it says are currently being performed by study room supervisors, the relationship of each task to the provisions of the *Education Act* and the collective agreement, the witnesses it intends to call, and a detailed outline of the evidence they are expected to give, not later than two weeks prior to the continuation of this matter. CUPE and the employer are hereby directed to respond to these claims, and to provide their own lists of witnesses and detailed outline of evidence to the Board and the other parties within one week thereafter. Upon receipt of this material, the Board may confer with the parties and make such determinations as it considers appropriate.

15. The following dates are available for the continuation of this matter: July 25 through July 27, 1994; August 2 through August 4, 1994; August 8 through August 10, 1994. The parties are directed to advise the Registrar, in writing, on or before Thursday, July 7, 1994 as to their available dates.

0197-94-U International Union of Operating Engineers Local 772, Applicant v. Labatt's Ontario Breweries, Division of Labatt Brewing Company Limited, Responding Party v. Brewery, General and Professional Workers' Union, Intervener

Strike - Specified Replacement Workers - Strike Replacement Workers - Ten stationary engineers employed at brewery's power plant commencing lawful strike - Employer using two managers from struck location, plus a third manager from non-struck location to do the struck work - Union applying for directions under section 73(12) of the *Act* in respect of use of third manager - Power plant requiring presence of stationary engineer 24 hours per day, 7 days per week - Scheduling for power plant normally involving three employees in 24 hour period each working 8 hours, with fourth employee to provide for days off - Employer asserting right to use, in addition to its two managers from the struck location, two specified replacement workers pursuant to section 73.2(3) to enable it to prevent danger to life, health or safety, destruction or serious deterioration of equipment or premises, or serious environmental damage - Board concluding that employer not satisfying its onus under section 73.2(15) and therefore not entitled to use specified replacement workers

BEFORE: *Judith McCormack*, Chair, and Board Members *W. A. Correll* and *D. A. Patterson*.

APPEARANCES: *B. Lawson*, *Peter Yemen* and *Bill Zinkan* for the applicant; *L. Bertuzzi*, *M. Tighe* and *R. Caron* for the responding party; *J. Cameron Nelson* for the intervener.

DECISION OF THE CHAIR, JUDITH McCORMACK, AND BOARD MEMBER

D. A. PATTERSON; June 30, 1994

1. This is an application brought by Local 772 of the International Union of Operating Engineers under section 73.2(12) of the *Labour Relations Act* for a determination with respect to the use of specified replacement workers. The issue before us relates to the application of section 73.2(3), which provides for certain exemptions to the general prohibitions on replacement workers set out in section 73.1.
2. The applicant union represents ten bargaining unit engineers at the responding company's brewery in London, Ontario. There are also approximately 350 production employees at this location who are represented by Local 304 of the Brewery, General and Professional Workers' Union which intervened in these proceedings. Some 200 employees at the brewery who are mostly employed in its administration offices are not unionized.
3. The applicant union and the responding company were parties to a collective agreement which expired on December 31, 1993. Notice to bargain was given by the union on November 16th, 1993, and negotiations then led to the appointment of a conciliation officer in February of 1994. Subsequently the Minister of Labour informed the parties that he was not appointing a conciliation board and on April 6th, members of the bargaining unit voted to strike by a margin of eighty-nine per cent.
4. On April 11th, the company wrote to the union giving notice of its intention to use specified replacement workers in the event of a strike. It indicated that it would require two engineers to perform the work of members of the union, citing that this was necessary to enable it to prevent a danger to the lives, health and/or safety of Labatt employees, and to prevent the destruction or serious deterioration of the company's machinery and equipment. The union declined to consent

to the use of specified replacement workers, as in its view section 73.2(3) did not apply. Among other things, the union asserted that the only reason that the company wished to use the two engineers was to keep production lines running, and that this did not qualify for the exemptions in section 73.2(3).

5. The following day, the union notified the company that failing an agreement to the contrary at a negotiating meeting scheduled for April 13th, a strike would commence at 12:01 a.m. on Sunday, April 17th. At a secret ballot vote on April 15 employees voted ninety per cent to reject the company's last position, and a strike commenced two days later.

6. Because the company's request for specified replacement workers was based on operating the power plant, much of the evidence before us was devoted to that issue. The power plant at the brewery consists of five systems: the steam plant, the compressor plant, the refrigeration plant, the carbon dioxide recycling system and an electrical generation system. It was common ground between the parties that under the *Operating Engineers Act*, a second class engineer must be present at all times while the power plant is in operation. They were also in agreement that there were two managerial employees qualified under the *Operating Engineers Act* in this regard, whom the company was entitled to use to replace striking bargaining unit members under the provisions of section 73.1. The company's view was that to staff the power plant on a twenty-four hour basis, the two managerial employees would have to each work eighty-four hours per week, and that it required two specified replacement workers so that the two managerial employees could work fewer hours. It concedes that it has been using a third engineer from a non-struck location to perform bargaining unit work since the strike began. It is the use of this third engineer which prompted the union's application for a determination under section 73.2(12).

7. On April 26, 1994, the Board issued the following decision:

This is an application brought by Local 772 of the International Union of Operating Engineers under section 73.2(12) of the *Labour Relations Act* for a determination with respect to the use of specified replacement workers. Having regard to the onus of proof under section 73.2(15), the evidence and submissions as a whole and the company's evidence and assertions that the power-house is being safely operated with those managerial employees who are also stationary engineers, a majority of the Board, Board member Correll dissenting, finds that the circumstances set out in section 73.2(3) do not exist at this point in time. As a result, the company is not entitled to use specified replacement workers. If there is any change in circumstances, either party may apply under section 73.2(13) for modification. Our respective reasons will follow.

We now provide our reasons.

8. Since this is the first decision in which the Board has had to consider the application of section 73.2(3), it is useful to examine it in some detail. Sections 73.1 and 73.2 as a whole provide as follows:

73.- (1) No person, employer, employers' organization or person acting on behalf of an employer or employers' organization shall engage in strike-related misconduct or retain the services of a professional strike breaker and no person shall act as a professional strike breaker.

(2) For the purposes of subsection (1),

"professional strike breaker" means a person who is not involved in a dispute whose primary object, in the Board's opinion, is to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under this Act in anticipation of, or during, a lawful strike or lock-out;

"strike-related misconduct" means a course of conduct of incitement, intimidation, coercion, undue influence, provocation, infiltration, surveillance or any other like

course of conduct intended to interfere with, obstruct, prevent, restrain or disrupt the exercise of any right under this Act in anticipation of, or during, a lawful strike or lock-out.

(3) Nothing in this section shall be deemed to restrict or limit any right or prohibition contained in any other provision of this Act.

73.1- (1) In this section,

“employer” means the employer whose employees are locked out or are on strike and includes an employers’ organization or person acting on behalf of either of them;

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and
- (b) an independent contractor;

“place of operations in respect of which the strike or lock-out is taking place” includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work.

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

- 1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
- 2. The strike vote was conducted in accordance with subsections 74(4) to (6).
- 3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

- 1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
- 2. The work of an employee in the bargaining unit that is on strike or is locked out.
- 3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).
5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

(7) The employer shall not require an employee who works at a place of operations in respect of which the strike or lock-out is taking place to perform any work of an employee in the bargaining unit that is on strike or is locked out without the agreement of the employee.

(8) No employer shall,

- (a) refuse to employ or continue to employ a person;
- (b) threaten to dismiss a person or otherwise threaten a person;
- (c) discriminate against a person in regard to employment or a term or condition of employment; or
- (d) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of the person's refusal to perform any or all the work of an employee in the bargaining unit that is on strike or is locked out.

(9) On an application or a complaint relating to this section, the burden of proof that an employer did not act contrary to this section lies upon the employer.

73.2-(1) In this section, "specified replacement worker" means a person who is described in subsection 73.1 (5) or (6) as one who must not be used to perform the work described in paragraphs 2 and 3 of sub-section 73.1(5).

(2) Despite section 73.1, specified replacement workers may be used in the circumstances described in this section to perform the work of employees in the bargaining unit that is on strike or is locked out but only to the extent necessary to enable the employer to provide the following services:

1. Secure custody, open custody or the temporary detention of persons under a law of Canada or of the Province of Ontario or under a court order or warrant.
2. Residential care for persons with behavioural or emotional problems or with a physical, mental or developmental handicap.
3. Residential care for children who are in need of protection as described in subsection 37(2) of the *Child and Family Services Act*.
4. Services provided to persons described in paragraph 2 or 3 to assist them to live outside a residential care facility.

5. Emergency shelter or crisis intervention services to persons described in paragraph 2 or 3.
6. Emergency shelter or crisis intervention services to victims of violence.
7. Emergency services relating to the investigation of allegations that a child may be in need of protection as described in subsection 37(2) of the *Child and Family Services Act*.
8. Emergency dispatch communication services, ambulance services or a first aid clinic or station.

(3) Despite section 73.1, specified replacement workers may also be used in the circumstances described in this section to perform the work of employees in the bargaining unit that is on strike or is locked out but only to the extent necessary to enable the employer to prevent,

- (a) danger to life, health or safety;
- (b) the destruction or serious deterioration of machinery, equipment or premises; or
- (c) serious environmental damage.

(4) An employer shall notify the trade union if the employer wishes to use the services of specified replacement workers to perform the work described in subsection (2) or (3) and shall give particulars of the type of work, level of service and number of specified replacement workers the employer wishes to use.

(5) The employer may notify the trade union at any time during bargaining but, in any event, shall do so promptly after a conciliation officer is appointed.

(6) In an emergency or in circumstances which could not reasonably have been foreseen, the employer shall notify the trade union as soon as possible after determining that he, she or it wishes to use the services of specified replacement workers.

(7) After receiving the employer's notice, the trade union may consent to the use of bargaining unit employees instead of specified replacement workers to perform some or all of the proposed work and shall promptly notify the employer as to whether it gives its consent.

(8) The employer shall use bargaining unit employees to perform the proposed work to the extent that the trade union has given its consent and if the employees are willing and able to do so.

(9) Unless the parties agree otherwise, the terms and conditions of employment and any rights, privileges or duties of the employer, the trade union or the employees in effect before it became lawful for the trade union to strike or the employer to lock out continue to apply with respect to bargaining unit employees who perform work under subsection (8) while they perform the work.

(10) No employer, employers' organization or person acting on behalf of either shall use a specified replacement worker to perform the work described in subsection (2) or (3) unless,

- (a) the employer has notified the trade union that he, she or it wishes to do so;
- (b) the employer has given the trade union reasonable opportunity to consent to the use of bargaining unit employees instead of the specified replacement worker to perform the proposed work; and
- (c) the trade union has not given its consent to the use of bargaining unit employees.

(11) In an emergency, the employer may use a specified replacement worker to perform the work described in subsection (2) or (3) for the period of time required to give notice to the trade union and determine whether the trade union gives its consent to the use of bargaining unit employees.

(12) On application by the employer or trade union, the Board may,

- (a) determine, during a strike or a lock-out, whether the circumstances described in subsection (2) or (3) exist and determine the manner and extent to which the employer may use specified replacement workers to perform the work described in those subsections;
- (b) determine whether the circumstances described in subsection (2) or (3) would exist if a strike or lock-out were to occur and determine the manner and extent to which the employer may use specified replacement workers to perform the work described in those subsections;
- (c) give such other directions as the Board considers appropriate.

(13) On a further application by either party, the Board may modify any determination or direction in view of a change in circumstances.

(14) The Board may defer considering an application under subsection (12) or (12) until such time as it considers appropriate.

(15) In an application or a complaint relating to this section, the burden of proof that the circumstances described in subsection (2) or (3) exist lies upon the party alleging that they do.

(16) The employer and the trade union may enter into an agreement governing the use, in the event of a strike or lock-out, of striking or locked-out employees and of specified replacement workers to perform the work described in subsection (2) or (3).

(17) An agreement under subsection (16) must be in writing and must be signed by the parties or their representatives.

(18) An agreement under subsection (16) may provide that any of subsections (4) to (10) do not apply.

(19) An agreement under subsection (16) expires not later than the earlier of,

- (a) the end of the first strike described in subsection 73.1 (2) or lock-out that ends after the parties have entered into the agreement; or
- (b) the day on which the parties next make or renew a collective agreement.

(20) The parties shall not, as a condition of ending a strike or lock-out, enter into an agreement governing the use of specified replacement workers or of bargaining unit employees in any future strike or lock-out. Any such agreement is void.

(21) On application by the employer or trade union, the Board may enforce an agreement under subsection (16) and may amend it and make such other orders as it considers appropriate in the circumstances.

(22) A party to a decision of the Board made under this section may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

(emphasis added)

9. In *The Canadian Red Cross Society*, [1994] OLRB Rep. Jan. 34, the Board described these provisions in general terms:

41. Section 73.1 sets out various kinds of prohibitions with respect to the performance of work during a strike. Those prohibitions relate to the type of person or employee involved, the nature of the work, the location of the work, reprisals, and certain conditions and definitions. Section 73.2 then provides exceptions to those prohibitions, various procedures and rights with respect to the performance of work in those exceptional conditions, a mechanism for agreement and provisions for directions and enforcement.

42. It is clear that these sections do not purport to ban the performance of the work of striking employees absolutely. For example, in addition to the named exceptions set out in section 73.2, the structure of section 73.1 permits the use of certain types of persons either explicitly or by omission. At the same time, however, it is also apparent that the prohibitions are very comprehensive in scope, particularly in the case of work performed at the strike location.

10. The Board also commented on the purpose of these sections:

37. There was a considerable degree of consensus between the parties with respect to the overall legislative intent of these sections. It is apparent that they are not “motive” provisions in the sense that anti-union animus or some specific kind of intent is required. Like section 81 which provides for a statutory freeze, an anti-union intent may be relevant, but not necessary. In contrast, for example, section 72(2) defines a “professional strike-breaker” as someone whose primary object is to interfere with, obstruct, prevent, restrain or disrupt the exercise of rights in connection with a strike or lockout, and provides that “strike-related misconduct” has a similar motive-oriented meaning.

38. We adopt the submissions of several of the responding parties to the effect that the purpose of these amendments is to preserve the integrity and effectiveness of the strike as an economic weapon and to provide countervailing economic power to employees. In addition, both the unions and several of the responding parties referred us to material related to the legislative process which indicated that in a more general sense, the Legislature intended these provisions to reduce industrial conflict, facilitate the entry of women, part-time and other marginalized employment groups into collective bargaining, and encourage compromise.

11. In *Famous Players Inc.*, [1993] OLRB Rep. Dec. 1270, the Board made these observations with respect to the purpose of section 73.1:

42. The purpose of section 73.1 is to inhibit a struck employer’s ability to carry on business. The Legislature has decided that it is appropriate to enhance the union’s power to wage a successful strike, by limiting the means open to an employer to resist. When bargaining unit members withdraw their labour, the employer is prohibited from drawing upon specified pools of replacement labour (bargaining unit members who don’t support the strike and may wish to work, employees from other locations, managers from other locations, transferees after the notice to bargain is given, the employees of a subcontractor, volunteers, etc.). Section 73.1 is not confined to “strike breakers” in the traditional sense. It encompasses a wide variety of potential sources of substitute labour. It is substitute labour or “replacement workers” that is the focus of the section, and it is in that light that one must consider the concept of bargaining unit work: the Statute prohibits employers from using replacement workers to get the strikers’ job done.

12. As the Board noted in *Red Cross, supra*, however, the ban on the use of replacement workers is not absolute. There are certain persons who are permitted to do bargaining unit work either explicitly or by omission under section 73.1. In addition, section 73.2 sets out first a series of enunciated exceptions when specified replacement workers are permitted in subsection (2), and then the more general exemption in subsection (3) which is at issue in this case.

13. The various provisions of section 73.1 and 73.2 are not necessarily static in their application. A union must meet certain conditions before the replacement worker prohibitions are triggered. Similarly, where an employer wishes to use specified replacement workers, it must satisfy certain requirements which relate to agreements between the parties, give priority for permitted work to bargaining unit members, stipulate terms and conditions of employment, provide for

emergencies, and so forth. It is also noteworthy that much of section 73.2 is directed towards encouraging agreement between the parties with respect to the use of specified replacement workers. We will return to these other provisions later in the context of arguments by the parties that aspects of these respective requirements were not met by either side to this dispute.

14. Section 73.2(3) makes it clear that while the Legislature has decided to enhance the ability of employees to wage a successful strike, it has also imposed limitations to avoid giving rise to certain kinds of hazards. The use of specified replacement workers is permitted to prevent danger to life, health or safety, the destruction of serious deterioration of machinery, equipment or premises, or serious environmental damage. However, specified replacement workers are allowed in these circumstances “only to the extent necessary to enable the employer to prevent” the described hazards.

15. This rather precise language brings us to the first issue in dispute, which involves the union’s contention that the circumstances set out in section 73.2(3) only arise if the brewery continues production. In counsel’s view, the language of this provision indicates that the company cannot bring itself within its ambit if it is in effect creating the exemption circumstances by insisting on maintaining the normal level of production. If this were not so, counsel argued, the company would be able to use specified replacement workers simply to continue production unabated, rather than for the real purpose of section 73.2(3) which was to protect against certain dangers which were otherwise unavoidable.

16. The company took the position that it was entitled to continue its production lines and operate its business as usual. Among other things, counsel commented that the company had reached a collective agreement with its production employees, and they were not on strike. Indeed, the company argued that shutting down the brewery would have the negative effect of causing a lay-off of production and office employees. (We note parenthetically that Local 304 of the Brewery, General and Professional Workers’ Union which represents production employees took the position at the hearing that economic consequences such as this should not be a factor in the Board’s decision under section 73.2(3).) Counsel was also of the view that section 73.2(3) must be read in context, and that such a context should include the assumption that the employer was entitled to continue operations.

17. Both arguments have some merit, and both are not without weaknesses. In considering the union’s position, we return to the Board’s observations in *Famous Players, supra*, to the effect that the purpose of section 73.1 is to inhibit a struck employer’s ability to carry on business. With this in mind, it seems unlikely that the intent of section 73.2(3) was to provide specified replacement workers to an employer with the effect of enabling it to continue business as usual. The fact that there may be a secondary or “domino” effect upon other bargaining units or employees is not unusual in labour disputes, and one which the Legislature obviously did not include in the list of exemption circumstances.

18. Looking at it another way, it is apparent that the replacement worker prohibitions may have a different impact on a given labour dispute depending on the circumstances. While the general intent is to enhance the union’s ability to wage a successful strike, the effect may vary depending on the bargaining strength of employees quite apart from these provisions. So, for example, employees in a weaker strategic position will presumably find their bargaining power augmented to some degree. At the same time highly-skilled employees occupying more pivotal positions are also likely to derive some benefit from the prohibition in section 73.1. If the overall impact on operations is more dramatic in the latter case, there is nothing about these provisions which suggest that section 73.2(3) was intended to dilute that effect, leaving aside the specified circumstances.

19. It is also difficult to infer from the language of these sections any general assumption that an employer is entitled to operate during a labour dispute. On the contrary, the very comprehensiveness of the prohibitions in section 73.1 suggests that in many cases, operations will be brought to a temporary standstill. And if the purpose of section 73.1 is to inhibit a struck employer's ability to carry on business, one can hardly say that ceasing production is not contemplated by these provisions.

20. On the other hand, we share the company's views that these sections do not give rise to any general assumption that a struck employer should not be able to operate, as long as it can do so without contravening the statute. Indeed, the fact that section 73.1 allows the use of some persons in specific circumstances suggests that an employer may well attempt to continue operations, and section 73.2(2) makes this explicit in certain situations.

21. In other words, it is difficult to divine from these provisions an underlying or general assumption with respect to either continuing or ceasing production. As a result, we find it more fruitful to focus on the specific language of the relevant sections.

22. Section 73.2(15), which places the burden of proof on the party alleging that the circumstances described in section 73.2(3) exist, provides a good starting point for our analysis. The functional effect in this case is that the company must establish that specified replacement workers are necessary to prevent the enumerated hazards from arising. Section 73.2(3) then provides that specified replacement workers may be used "but only to the extent *necessary* to enable the employer to prevent [those circumstances]". This lends some support to the union's position. If the company can prevent the hazards from arising by means other than the use of specified replacement workers, it may find it more onerous to establish that such workers are "necessary" as a practical matter. This phrase also reflects a quantitative assessment; that is, that even where specified replacement workers are necessary, they can only be used *to the extent* necessary to prevent the listed circumstances and no more. The result is that the language suggests both that if there are other means available for preventing the hazards, an employer may not be able to establish that specified replacement workers are necessary, and that where it can do so, the remedy permitted will be closely tailored to the specific hazards to avoid the possibility of abuse.

23. This sheds at least some light on the parties' arguments. If a party alleges that specified replacement workers are necessary on the basis of maintaining a certain course of conduct, that party may also have to establish that such course of conduct is necessary within the meaning of section 73.2(3) as well. Otherwise a party could indeed structure circumstances in a manner which gives rise to the conditions set out in section 73.2(3) and then claim the exemption. This would not be consistent with the purpose of these provisions, which the Board noted in *Famous Players*, *supra*, "prohibits employers from using replacement workers to get the strikers' job done".

24. At the same time, there is no doubt that if the enumerated dangers or damage will arise, the section entitles an employer to relief. And although the language indicates that an applicant must establish that specified replacement workers are in fact necessary, the extent to which an employer must go in expending other means before coming to the Board for a remedy is not particularly clear. Even if we accept, as we do, that the intent of sections 73.1 and 73.2 is to enhance the impact of the strike sanction, there are areas in which the degree of that enhancement is not spelled out. This has implications not only for whether specified replacement workers are required under section 73.2(3) but how many and in what manner they will be used as well.

25. In this case, the situation is further complicated by the stark contrast in the parties' positions. The union argues for an interpretation of section 73.2(3) which could lead to shutdown of the brewery for the duration of the strike. The company's position would have the result of almost

entirely insulating its operations from the strike. Because the difference between their positions in concrete terms is the difference between one engineer on duty and no engineer on duty, there is less middle ground available than in circumstances where a number of employees might be involved, or where the issue is only one of the degree of hindrance posed by sections 73.1 and 73.2.

26. As it turns out, it is not necessary to resolve this dilemma in the matter before us because the company also alleges that if it were to shut down the power plant entirely, that in itself would give rise to danger to life, health or safety, the destruction or serious deterioration of machinery, equipment or premises and serious environmental damage. Thus counsel argues that even if the company ceased production, it would still require an engineer to monitor the power plant systems on a twenty-four basis.

27. We heard extensive evidence in this regard which we need not set out in detail. Suffice it to say that while some of the evidence was inflated, we are persuaded that a total shutdown of the power plant was likely to result in the drying out of packing glands on pipes in the brewery which normally carry ammonia gas in the refrigeration system. We also accept that this is likely to cause leaks of ammonia gas, and that draining the system carries with it its own risks in this regard. In other words, we find as a fact that even if the brewery were to cease production, it would still be necessary to have an engineer on duty to keep at least the refrigeration system operational. We therefore reject the union's argument that no engineers at all are necessary within the meaning of section 73.2(3). The result is that there is no difference in the number of engineers required on duty whether or not the company is in full production or has ceased production on a temporary basis. Because at least one engineer is required in either case, it is not necessary for us to resolve the parties' arguments in this regard.

28. There are other issues in dispute between the parties, however. The company's own evidence indicates that it has two managerial employees who are able to operate the power plant safely and legally having regard to both sections 73.1 and the *Operating Engineers Act*. In fact, counsel for the company conceded that the company can safely operate the power plant with these two managerial employees, but that logically, the company would like to be able to give them more time off and wished to use specified replacement workers as a bridge for this purpose. He asserted, however, that the company would continue to operate with these employees whether or not the Board permitted the use of specified replacement workers as well.

29. We find the evidence in this regard somewhat problematic. Common sense suggests that employees working eighty-four hours per week may find this schedule rather difficult. On the other hand, specified replacement workers are not available under section 73.2(3) on the grounds of inconvenience, adversity or difficulty. It was not suggested that the two managerial employees were so exhausted or would become so exhausted on this schedule that the situation would fall within the criteria in section 73.2(3), and there was no evidence to this effect. On the contrary, one of the managerial engineers testified that the two of them could operate the plant for as long as necessary. The union characterized the company's evidence and argument in this regard as amounting to the proposition that it would be nice to give them some time off. This did, indeed, appear to be fairly close to the company's position. Such a proposition falls short of establishing that the conditions for the use of specified replacement workers have been met.

30. Although our decision in this regard is based on the application of the criteria in section 73.2(3), we also note that the scheduling for the power plant normally involves three employees in a twenty-four period each working eight hours, with a fourth employee to provide for days off. If we were to allow the two specified replacement workers the company requests, the effect together with the two managerial employees would be to virtually nullify the impact of the strike. It is not

uncommon for managerial employees to work harder during a strike; this is part of the pressure economic sanctions exert which the theory of collective bargaining presumes will encourage settlement. Undermining that pressure by using specified replacement workers to restore the working complement to close to normalcy is not consistent with the general thrust of sections 73.1 and 73.2 either.

31. We therefore concluded that specified replacement workers were not necessary within the meaning of section 73.2(3) at this point in time.

32. There are two other matters raised by the parties that relate to threshold requirements under the replacement worker provisions. The union points to section 73.2(5) which we reproduce again for convenience:

(5) The employer may notify the trade union at any time during bargaining [that it wishes to use specified replacement workers] but, in any event, shall do so *promptly* after a conciliation officer is appointed.

(emphasis added)

There is no dispute that the company did not give notice to the union in this regard until some two months after the conciliation officer was appointed.

33. Section 73.2(10) then prohibits the use of specified replacement workers unless, among other things, the employer has notified the trade union that it wishes to do so:

(10) No employer, employers' organization or person acting on behalf of either shall use a specified replacement worker to perform the work described in subsection (2) or (3) unless,

- (a) the employer has notified the trade union that he, she or it wishes to do so;
- (b) the employer has given the trade union reasonable opportunity to consent to the use of bargaining unit employees instead of the specified replacement worker to perform the proposed work; and
- (c) the trade union has not given its consent to the use of bargaining unit employees.

The union asserts that because the company did not give notice promptly as required, it was not entitled to use specified replacement workers at all.

34. Certainly it is clear that the scheme of section 73.2 is to ensure that the employer gives notice in a timely way so that the parties can then follow the sequence of events set out, including reasonable opportunities for the union to consent to the use of bargaining unit employees and for the parties to reach the kind of agreements contemplated by section 73.2(16) to (21). If the employer could simply give notice at any time, the operation of that scheme which provides for priority for bargaining unit employees and encourages settlement could be impaired to some extent. It is also true, however, that section 73.2(10)(a) does not provide that the notice must be timely, or in accordance with section 73.2(5). On its face, it appears to require only that notice has been given. Moreover, it seems unlikely having regard to the seriousness of the hazards set out in section 73.2(3) that the Legislature intended that if an employer was late in giving notice, specified replacement workers could not be used even to prevent danger to life, health or safety, for example.

35. In the case before us, we have already concluded that the employer has not met the criteria of section 73.2(3) in any event. As a result, it is unnecessary for us to comment definitively on

the legal impact of a late notice. However, we would observe that at the very least, a late notice may undermine the credibility of an employer's assertions with respect to the necessity of specified replacement workers, and may add to its practical evidentiary burden in circumstances where it may already be carrying the onus of proof pursuant to section 73.2(15).

36. Finally, the company asserts that the union is not entitled to the prohibition against the use of replacement workers in this case, on the grounds that the bargaining unit was not on strike within the meaning of section 73. Again for convenience we reproduce those provisions:

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

37. Section 73.1 only applies to a lock-out or a lawful strike, and thus the company argues that unless the conditions have been met for the bargaining unit to be considered on strike, there is no prohibition against replacement workers. Specifically, the company asserts that because the notice given by the union was several days prior to the actual withdrawal of services by employees, the union had not given the employer notice in writing that the bargaining unit "is on strike". Rather, the union had only given notice in writing that the bargaining would be on strike on a date in the future. To meet the conditions in this section, the company argues that notice can only be given after the strike has begun.

38. We do not find this proposition particularly attractive. It seems to us that practical labour relations are aided by advance notice of a strike, and that common sense suggests that a notice to the employer after employees have left their work is not only redundant, but rather absurd. Presumably the employer will have already noticed their absence. On the other hand, the wording of this provision appears to lend some support to the proposition. Moreover, in this case the union's advance notice was not unequivocal. It indicated that a strike would only occur if agreement was not reached at a meeting scheduled between the time of the notice and the day the strike was to commence. It was thus quite possible that employees would not actually go on strike on the date in the notice.

39. At the same time, the company could not point to any unfairness, prejudice or the erosion of any substantive purpose as a result of the union's advance notice. Indeed, it was common ground between the parties that the purpose of this provision was to prevent the application of sections 73.1 and 73.2 to strikes not authorized by the employees' bargaining agent, a matter which was not in issue in the circumstances before us. In that sense, the company's objection was rather technical. With this in mind, we note that the union included in this application a statement that the union commenced a strike on April 18th, a statement which was in writing and delivered to the employer after the strike commenced. In the particular circumstances before us, we find that this fulfils the requirement in section 73.1(3)(b). As a result, we reject the company's argument that the bargaining unit is not on strike, and we find that the prohibitions in section 73.1 apply.

40. For all these reasons, we concluded that the company had not satisfied the onus upon it as a result of section 73.2(15) and was therefore not entitled to use specified replacement workers at this point in time.

ADDITIONAL COMMENTS OF BOARD MEMBER W. A. CORRELL; June 30, 1994

1. The award in this case recognizes that the purpose of the “replacement worker” sections of the Act is to inhibit an employer’s ability to continue operations and production. In this case however the employees, who are operating engineers, do not produce anything. Their sole function and responsibility flows from the *Operating Engineers Act* i.e. “be responsible for the safe operation of the plant” and “maintain a close watch on the condition and repair of all equipment in the plant” as well as “take such measures as are necessary to prevent any immediate danger”.

2. The award also recognizes that even if the production departments were completely shut down it would be necessary to have second class operating engineers at the plant (see para. 27). This requirement flowing from another piece of legislation would have put this Board in an interesting quandary in trying to administer or rule on section 73 of the *Labour Relations Act*.

3. This panel fortunately did not have to face that dilemma since there were management employees with the required qualifications to carry out the company’s responsibility under the *Operating Engineers Act* and additional replacement workers were not required.

4. It is also fortunate that all matters have been resolved. I for one would not want to be part of a decision that put in jeopardy the safety of others both inside or outside of the plant. As noted in the award the two management replacement workers would be put under strain by working 84 hours per week. The longer that situation continued the more risk there would be that one or both, through sheer exhaustion or illness would not be able to respond alertly to their responsibilities. Testing the reality of whether or not this was an unsafe situation is not a good way to manage.

5. For these reasons I have concerns about how well this section was crafted as we see problems unfold that have not been anticipated or thoroughly thought through.

6. Finally the company’s contention that it was not notified properly in accordance with the Act that “the bargaining unit was on strike” should not be brushed aside. I do not join with the majority in this award on that issue. The Act is quite specific and it is a carefully chosen phrase and a deliberately defined procedure. Without it several consequences could flow that could cause harm to both parties. If only a part of the bargaining unit decided to strike, it would seem that the bargaining agents would not be happy with part of their unit striking and part trying to gain access to the workplace. It is doubtful if the agent would be in full control of any continued collective bargaining if their member support was seen to be divided. The replacement worker section of the Act would be meaningless in a situation where some workers were available for some of the work and others not available. None of these consequences came about in this instance and once again we were fortunate that we or the parties did not have to deal with that kind of confusion. We should not however accept that the manner in which the union notified the company of its intention to strike in this instance was in full compliance of the Act.

1626-92-U Louis Lauzon, Applicant v. Teamsters, Chauffeurs, Warehousemen and Helpers, Local 91, Responding Party

Duty of Fair Referral - Intimidation and Coercion - Remedies - Unfair Labour Practice - Applicant working as owner-operator under agreement between Pipe Line Contractors and Teamsters' union - Board concluding that union's actions in introducing rotation system, referring applicant to Deep River following lay-off from Stittsville loop, handling of applicant's grievance and various other matters not violating union's duty of fair referral - Board finding that union's refusal to allow applicant to pay union dues, renew membership and restore name to dispatch list designed to penalize him for filing complaint with the Board, contrary to section 82(2) of the *Act* - Union directed to compensate applicant for lost earnings and to restore applicant's name to dispatch list upon his tendering payment of outstanding dues

BEFORE: *Robert D. Howe*, Vice-Chair.

APPEARANCES: *Marthe Montreuil*, *Charles V. Hofley* and *Patricia P. Brethour* for the applicant; *Michael Van Dusen*, *D. Fernandez*, *A. Papineau*, *A. MacFarlane*, *R. Thompson* and *N. Dunlevie* for the responding party.

DECISION OF THE BOARD; June 17, 1994

1. This is a complaint under section 91 of the *Labour Relations Act* (the "Act").
2. The complaint, as initially filed with the Board on September 9, 1992 by Marthe Montreuil (who served as the applicant's counsel during the first two days of hearing), alleged that the responding party (also referred to in this decision as "Local 91" and the "Union", for ease of exposition) had contravened what is now section 69 [formerly section 68] of the Act. However, the amended complaint subsequently filed with the Board by Charles V. Hofley and Patricia P. Brethour (who replaced Ms. Montreuil as Mr. Lauzon's counsel for the balance of the proceedings) alleged that the applicant had been dealt with by the Union contrary to sections 70 and 82(2) of the Act.
3. Although Marine Pipeline Construction of Canada Limited ("Marine") was duly notified of the complaint and the hearing scheduled by the Board (in view of the possibility that it might be affected by the remedy awarded by the Board in the event that the complaint was granted), no one appeared on its behalf.
4. In its reply and in the initial submissions made to the Board by Michael Van Dusen who served at its counsel throughout the course of these proceedings, the Union disputed the Board's constitutional jurisdiction to deal with this complaint. However, after counsel's attention was drawn to *Re Henuset Rentals Ltd. and U.A. Local 488* (1980), 119 D.L.R. (3d) 639 (Sask. C.A.), and *Johnston Terminals and CLRA*, [1982] 2 CAN LRBR 446, which each applied the Supreme Court of Canada decision in *Montcalm Construction Inc. v. Minimum Wage Commission et al.* (1979), 93 D.L.R. (3d) 641, in concluding that labour relations matters regarding employees of pipeline construction contractors fall within provincial jurisdiction, the Union abandoned that position and acknowledged that the Board has jurisdiction to hear and decide Mr. Lauzon's complaint.
5. During the twelve days devoted to the hearing of this matter, fourteen persons were called as witnesses. In addition to their testimony, the Board has before it thirty-five exhibits which were entered during the course of the proceedings. In making the findings and reaching the conclusions set forth in this decision, the Board has duly considered all of that oral and documentary evi-

dence, the submissions of counsel, and the usual factors germane to assessing evidentiary credibility and reliability, including the firmness and clarity of the witnesses' respective memories, their ability to resist the influence of self-interest when giving their version of events, the internal and external consistency of their evidence, and their demeanour while testifying. The Board has also assessed what is most probable in the circumstances of the case, and considered the inferences which may reasonably be drawn from the totality of the evidence.

6. Marine was one of the employers bound by the 1991-1993 Teamsters Mainline Pipeline Agreement for Canada (the "Agreement") between the Pipe Line Contractors Association of Canada and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of Canada (the "Teamsters Union") and its Local Unions, such as Local 91, having pipeline jurisdiction. That agreement (and its predecessors) required that all of the work covered by it be performed by members of the Teamsters Union. It also required owner-operators performing any such work to be or become members of the Teamsters Union.

7. Prior to 1990, the referral of owner-operators to pipeline work in the Ottawa area was carried out by The Greater Ottawa Trucking Association (the "Association"). When such work became available within its geographical jurisdiction, Local 91 would request the Association to dispatch owner-operated equipment to the site, conditional upon each dispatched owner-operator becoming a member of Local 91. Upon completion of the job, each such owner-operator would be given a withdrawal card, and would have nothing more to do with Local 91 until another pipeline job came into the area.

8. In 1989 an owner-operator named Norm Dunlevie approached Andre Papineau (who has been a Business Agent for Local 91 since 1986, and who became its President in May of 1990) with a view to exploring the possibility of developing closer ties between the owner-operators and the Union. Following extensive discussions involving Mr. Dunlevie, Mr. Papineau, other Union officials, and members of the Association's Board of Directors, Local 91 began to recruit owner-operators as members and succeeded in signing up a substantial number of them during 1990 and 1991.

9. When Local 91 began to operate its own dispatch system for owner-operators, it sought to create a system that would give all of the owner-operators an opportunity to work, and that would eliminate the practice by which some of the owner-operators had obtained greater work opportunities by giving foremen various items such as hockey tickets and bottles of alcohol. The Union's dispatching of owner-operators to the pipeline job in 1990 ran quite smoothly. However, the Union encountered some problems regarding the operation of its owner-operator dispatch system in respect of the pipeline job in 1991. In an attempt to fairly apportion work opportunities amongst the owner-operators, it decided at the end of that job to rotate to the bottom of the dispatch list all of the owner-operators whose trucks had grossed \$15,000 or more from that job. However, this did not prove to be satisfactory as a number of the owner-operators only had gross earnings in excess of that amount by virtue of their obligation to collect G.S.T. Moreover, the owner-operators who had tri-axes or who used their tandems to carry rock reached that level of gross earnings more quickly than those with tandems carrying sand, by virtue of the premium rates negotiated by the Union for tri-axes and rock carriers. Thus, the Union decided on the basis of its experience in 1991 that if the list was to be rotated in 1992, the rotation should be based upon hours on the job, rather than gross earnings.

10. Angus MacFarlane became a Business Representative for Local 91 in March of 1992. He had been a Vice-President and Business Representative of Teamsters Local 880 for the preceding five years and had "driven truck" in various places for many years before that. He had also

previously worked for the Ford Motor Company in St. Thomas, where he had been a U.A.W. representative in 1967. The applicant also worked there at that time, and he and Mr. MacFarlane became friends as a result of their work relationship.

11. Mr. MacFarlane's primary area of responsibility as a Local 91 Business Representative was construction. His responsibilities included not only the representation of drivers employed by construction companies, but also the representation of owner-operators who were members of the responding party.

12. In April of 1992 pipeline construction work in Local 91's area was awarded by Trans-Canada Pipeline ("Trans-Canada") to a joint venture (referred to in the evidence as "Marine/Banister" and "Banister/Marine") comprised of Marine Pipeline Construction of Canada Limited and Banister Pipelines. (Since nothing turns on its precise identity in this case, the Board will continue to refer to the employer as "Marine" in this decision, for ease of exposition.) That job was to commence in June and to continue until November, with an estimated total crew of 700 at its peak.

13. On May 7, 1992, the Union held a meeting which was attended by approximately a hundred owner-operators. The main topic discussed at that meeting was the pipeline job and other possible work opportunities for owner-operators. It was explained at that meeting that if those other work opportunities materialized, there would probably be sufficient work to keep all of the owner-operators busy. However, the only job that was a certainty at that time was the pipeline, which would not provide enough work for all of the owner-operators. Thus, the possibility of a rotation system was discussed at that meeting. Philip O'Reilly, who was one of the owner-operators in attendance at that meeting, suggested that there be a rotation of trucks every two weeks, as had occurred when he was working in Newfoundland. However, that suggestion found favour with neither the Union officials conducting the meeting nor the owner-operators in attendance, as they were all of the view that it would be impractical and unworkable in the context of the pipeline. Although there is some conflicting evidence on the matter, and although not every witness who was in attendance at the meeting recalls it being discussed, the Board is satisfied on the totality of the evidence that during the course of that meeting the owner-operators were advised that in the event the other work did not materialize, the Union reserved the right to introduce a rotation in respect of the pipeline job so that all of the owner-operators would get some work.

14. Marine's 1992 pipeline construction work in the greater Ottawa area consisted of three loops: Pembroke, Stittsville, and Deep River. Pembroke was the first loop to become operational, followed by the Stittsville and then Deep River. Owner-operators were referred to a particular loop and were generally not moved from one loop to another, as each of the loops functioned separately on a day to day basis.

15. Following the pre-job meeting that was held on May 14, 1992, the Union was requested to send ten trucks to start work at the Pembroke loop on June 8. Since it was not feasible for Mr. MacFarlane to personally cover the entire job, he decided to appoint Mr. Dunlevie and Mr. Lauzon as Union contact people for the owner-operators on the Pembroke loop. He deemed it advisable to have two contact people on that loop because it was expected that there might be as many as eighty trucks working there at the peak of construction. As indicated later in this decision, Mr. MacFarlane also subsequently appointed a Union contact person for the owner-operators working on the Stittsville loop, and a Union contact person for the owner-operators working on the Deep River loop.

16. Although they were frequently referred in the evidence as "stewards" because that is a title commonly used in union circles to describe persons elected or appointed to assist persons rep-

resented by a union, it is clear from the totality of the evidence that neither Mr. Lauzon nor any of the other owner-operator contact persons appointed by the Union was the "Job Steward" within the meaning of Article III of the Agreement (which provides for the "Job Steward" to be "one of the first hired and ... the last employee laid off in his classification provided he is competent to perform the work to be completed"). The person who was appointed by the Union as the Job Steward (within the meaning of that provision) on the 1992 pipeline job was Mike McCarthy, who was not an owner-operator. Unlike Mr. McCarthy, whose responsibilities included meeting with supervisors in order to resolve problems encountered by employees on the site, individuals such as Mr. Lauzon who were appointed by the Union as "stewards" for the owner-operators did not have any authority to deal with supervisors; their responsibilities were limited to relaying to Mr. MacFarlane information regarding owner-operator complaints and other problems encountered on the job, so that Mr. MacFarlane could resolve them. Although Marine was not legally obligated to do so, management apparently agreed to honour Mr. MacFarlane's request that in the event it was necessary to lay off some of the owner-operators, they would attempt to keep the owner-operator "stewards" on the job so that the Union would have them there as contact people. (For ease of exposition, Mr. Lauzon and the other people appointed by the Union as owner-operator contact people will also be referred to in this decision as "stewards".)

17. With the approval of Mr. Papineau, Mr. MacFarlane selected Mr. Dunlevie as one of the aforementioned owner-operator stewards because he had previously performed that role, and because of his extensive involvement from "day one" with the owner-operators and the Union. Being unfamiliar with any of the other owner-operators, Mr. MacFarlane selected Mr. Lauzon as an owner-operator steward because he knew him from their having previously worked together. Mr. Dunlevie was to have been the first owner-operator steward dispatched to the Pembroke loop, but he was unable to be there at the start of the job because his truck engine blew up. Thus, Mr. Lauzon was dispatched to the Pembroke loop on June 8 as the owner-operator steward, along with nine other owner-operators. By the time Mr. Dunlevie's truck was repaired, the Stittsville loop had also begun to operate, so Mr. MacFarlane decided to send him there as an owner-operator steward, rather than to Pembroke. Thus, Mr. Dunlevie was dispatched to the Stittsville loop on June 15. However, after he had been there for about four days, Mr. MacFarlane asked him to leave Stittsville and go to the Pembroke loop to help Mr. Lauzon with the many problems that were being encountered there. Mr. MacFarlane then appointed an individual named Bob Thompson as the owner-operator steward on the Stittsville loop.

18. The applicant initially experienced few difficulties as an owner-operator steward on the Pembroke loop. However, as the number of trucks on that loop increased, he encountered many problems and the position began to (in the words of Mr. MacFarlane) "get on his nerves". Mr. Lauzon's inability to handle the increasing pressure was no doubt due at least in part to his quick temper and lack of patience, combined with his inexperience as an owner-operator steward. Thus, as time went on, Mr. MacFarlane began to receive an increasingly large number of complaints about Mr. Lauzon from other owner-operators. Mr. MacFarlane "took [those complaints] with a grain of salt", because he recognized that it was not an easy job to look after that many trucks, and because he felt that the majority of the issues causing unrest among owner-operators at the Pembroke loop were petty. However, it may reasonably be inferred that this unrest, and Mr. Lauzon's inability to calmly and efficiently handle the problems presented by the increasingly large number of trucks on the site, fortified the Union's conclusion that Mr. Lauzon should be moved to the Stittsville loop in order to avoid his being discharged by Marine as a result of the events described below.

19. On July 7, 1992, an Inspector employed by Trans-Canada, whose vehicles have the right of way on all roads on the site, complained that he had been run off the road by Mr. Lauzon's

truck. He raised the matter that morning with Willie Craven, who was a safety representative for Marine and an assistant to Roy Fayant, the foreman on the Pembroke loop. The Inspector told Mr. Craven that the truck had been proceeding at an excessive rate of speed and that if he had not gone off the road into the ditch there would have been a head-on collision. When Mr. Fayant became aware of the Inspector's complaint, he told Mr. Dunlevie that he wanted to get rid of Mr. Lauzon. Although Mr. Fayant could have discharged Mr. Lauzon from the pipeline job, he indicated that he would refrain from doing so if Mr. Lauzon was moved from the Pembroke loop to the Stittsville loop. Mr. Dunlevie attempted to contact Mr. MacFarlane on July 7 to discuss the matter with him, but was unable to do so because Mr. MacFarlane was in Toronto on Union business. However, Mr. Dunlevie did manage to contact Mr. Papineau at home that evening to ask him if Mr. Lauzon could be moved to Stittsville to avoid being discharged. After Mr. Papineau gave his approval to that course of action, Mr. Dunlevie contacted Mr. Lauzon, advised him of the transfer, and told him to report to work at the Stittsville loop the next morning.

20. When Mr. Papineau spoke on the telephone with Mr. MacFarlane in Toronto the following evening and advised him of the situation, Mr. MacFarlane agreed that protecting Mr. Lauzon's job by transferring him from Pembroke to Stittsville had been the appropriate action for the Union to take under the circumstances. Indeed, it is clear from the evidence that Messrs. Dunlevie, MacFarlane, and Papineau were all of the view that Mr. Fayant had done Mr. Lauzon a favour by not discharging him, and were also of the opinion that in view of the many problems he had encountered at Pembroke, Mr. Lauzon would be (in the words of Mr. MacFarlane) "much better off" on the Stittsville loop "because it was a much smaller group [and] it was much quieter there." However, it is also clear from the evidence that at the time they reached those not unreasonable conclusions, they were unaware that the work at Stittsville was winding down and that a number of trucks would soon be laid off from that loop.

21. After Mr. Lauzon was transferred from Pembroke to Stittsville, he ceased to be an owner-operator steward. As noted above, Mr. Thompson had been appointed by the Union as owner-operator steward for the Stittsville loop when Mr. Dunlevie left Stittsville to go to Pembroke. The Union did not need a second owner-operator steward at Stittsville, because there were only about twenty trucks on that loop at that time.

22. It would have been preferable for the Union to have discussed the proposed transfer, and the reasons for it, in greater depth with Mr. Lauzon on the evening of July 7 (as would likely have occurred if Mr. MacFarlane had not been away in Toronto on Union business). However, it is evident from Mr. Lauzon's own testimony that neither the transfer nor the loss of his position as steward bothered him. It was his evidence that when Mr. Thomson informed him upon his arrival at Stittsville on July 8 that he was not a steward there, Mr. Lauzon said "That's fine", and kept on working. Having regard to all of the circumstances, including the need for quick action in order to save Mr. Lauzon from being discharged by the Company, the desirability of removing Mr. Lauzon as a source of unrest at the Pembroke loop, and the highly undesirable position that Mr. Lauzon would have been in from an economic and tactical point of view if Mr. Fayant had proceeded with his plan to discharge him, the Board is satisfied that the Union did not act arbitrarily, discriminatorily, or in bad faith in respect of that transfer.

23. As a result of a shortage of work, the applicant was laid off by Marine on July 25, 1992, along with the other five owner-operators who were the most recent arrivals on the Stittsville loop. As soon as the Union became aware of his lay-off, it advised the applicant that the Deep River loop would be starting up in the near future and assured him that he would be sent to work at Deep River. Accordingly, Mr. Lauzon went to Deep River approximately two weeks later and remained there until he completed a total of six hundred hours of 1992 pipeline work. He was then

rotated to the bottom of the list in accordance with the Union's mid-summer decision to introduce a six hundred hour rotation system on the pipeline, in an effort to ensure that all of the owner-operators obtained some work on the pipeline that year, since none of the aforementioned other work opportunities had materialized.

24. Although Mr. Lauzon and some of the other owner-operators working on the pipeline job were opposed to the introduction of a rotation system, the Board is satisfied on the totality of the evidence that the Union did not contravene section 70 of the Act by introducing the aforementioned rotation system which it concluded, not unreasonably, would be in the best interest of the owner-operators as a whole.

25. Having duly considered all of the evidence and the able submissions of counsel, the Board is also satisfied that none of the Union's other actions were violative of section 70, including its referral of Mr. Lauzon to Deep River following his lay-off from the Stittsville loop, and the manner in which it handled the grievances which Mr. Lauzon sought to file in respect of that lay-off and various other matters, which the Union not unreasonably viewed as involving no violation of the Agreement.

26. Having concluded that the complaint should be dismissed insofar as it pertains to section 70 of the Act, the Board must now determine whether the Union has contravened section 82(2), as further alleged by the applicant.

27. Section 82(2) of the Act provides as follows:

No trade union, council of trade unions or person acting on behalf of a trade union or council of trade unions shall,

- (a) discriminate against a person in regard to employment or a term or condition of employment; or
- (b) intimidate or coerce or impose a pecuniary or other penalty on a person,

because of a belief that the person may testify in a proceeding under this Act or because the person has made or is about to make a disclosure that may be required in a proceeding under this Act or because the person has made an application or filed a complaint under this Act or has participated in or is about to participate in a proceeding under this Act.

28. It is the applicant's contention that the Union contravened that provision of the Act by refusing to allow him the pay his Union dues and renew his membership, in an effort to intimidate or coerce him, or to impose a penalty upon him, as a result of his having filed this complaint.

29. On September 24, 1992, Local 91 sent the following letter to the applicant (on the Union's letterhead):

THIS IS TO ADVISE YOU THAT YOU ARE CURRENTLY PAID THROUGH OCTOBER 1992.

WE ARE BILLING YOU FOR THE FOLLOWING MONTHS:

NOVEMBER 1992 THROUGH OCTOBER 1993 - \$25.00 x 12 months = \$300.00

THE AMOUNT OF \$300.00 OWING FOR UNION DUES MUST BE RECEIVED IN OUR OFFICE NO LATER THAN FRIDAY, OCTOBER 30, 1992, 4:30 P.M.

EFFECTIVE NOVEMBER 1, 1992 IF YOUR DUES ARE NOT PAID UP TO DATE TO

INCLUDE OCTOBER 1993 - YOUR NAME WILL BE REMOVED FROM THE INDEPENDENT DISPATCH LIST.

AFTER WE HAVE RECEIVED YOUR PAYMENT OF \$300.00 FOR DUES, WE WILL MAIL YOU A WINDSHIELD STICKER TO BE PUT IN THE WINDOW OF THE TRUCK THAT YOU HAVE REGISTERED WITH US, SHOWING YOUR DUES PAID FOR NOVEMBER 1992 THROUGH OCTOBER 1993.

IF YOU HAVE ANY QUESTIONS REGARDING THIS BILLING PLEASE DO NOT HESITATE TO CALL CINDY POWER AT THE ABOVE NUMBER.

30. Similar materials were sent by the Union to all of the other owner-operators at that time. Each of the letters was accompanied by a copy of the Union's September 1992 Rules and Regulations for Independents, and an information sheet which was to be completed by the owner-operator and returned to the Union office to enable the Union to update its records regarding the owner-operator's address, telephone number(s), vehicle, etc.

31. In response to that letter, Mr. Lauzon mailed a cheque in the amount of \$300 to Local 91 on October 26, 1992. Although there is no evidence before the Board that Mr. Lauzon mailed the aforementioned information sheet to the Union along with his cheque, there is also nothing before the Board which indicates that any of the pertinent information had changed from what was already on file with the Union, and the Board is satisfied that the Union would not, in the normal course of events, have declined to renew Mr. Lauzon's membership on the basis of that technicality.

32. Mr. Lauzon's cheque was never cashed, and the Union has no record of ever having received it. Although it is possible that the cheque was received by the Union and subsequently misplaced, it appears more likely that it was lost in the mail and, therefore, never delivered to the Union's office. Mr. Lauzon was unaware that his Union dues remained unpaid until that fact was drawn to his attention by Mr. MacFarlane during a recess in the hearing on January 12 or 13, 1993 (which were the first two days of hearing of this matter). During that recess Mr. MacFarlane told Mr. Lauzon that the outcome of the hearing would not make any difference as he was no longer a member of the Union because he had not paid his dues. When the applicant subsequently attempted to obtain the cancelled cheque from his bank in order to establish that he had paid his Union dues, he discovered that there was no cancelled cheque as the cheque which he had sent to the Union had not been cashed.

33. There is a substantial conflict in the evidence concerning when the applicant next attempted to pay his Union dues. It was Mr. Lauzon's testimony that he went to the Union office in January shortly after the hearing and asked Cindy Power (who has been employed there for many years as a receptionist, typist, and dispatcher) if he could see Mr. Papineau to give him a cheque for his Union dues, but was told by Ms. Power that Mr. Papineau was not in and that he (Mr. Lauzon) was not allowed in the office. Ms. Power, on the other hand, testified that Mr. Lauzon did not come to the Union office at any time in January when she was present, and firmly denied that the conversation described by Mr. Lauzon had taken place. As indicated below, it is unnecessary for the Board to resolve that conflict in the circumstances of this case.

34. In mid January of 1993 the applicant obtained work in Thunder Bay and, accordingly, left the Ottawa area. While he was in Thunder Bay, a cheque in the amount of \$300 was sent to counsel for the Union by Marthe Montreuil, who was the applicant's counsel at that time, along with the following letter, pursuant to Mr. Lauzon's instructions:

Objet: Louis Lauzon c. Teamsters Local 91

Vous trouverez ci-joint un chèque de 300\$ émis au nom des Teamsters pour la cotisation annuelle de mon client. Ce dernier m'indique avoir fait des recherches afin de retrouver le chèque initial, envoyé par le courrier, mais ne l'a jamais retrouvé.

Nous vous demandons de bien vouloir l'acheminer à votre client en main propre afin d'éviter qu'il soit encore perdu.

(Ms. Montreuil sent the cheque to Union counsel rather than to the Union as a matter of professional courtesy, since Union counsel had characterized as unprofessional her previous direct contact with his client.)

35. That cheque was returned to Ms. Montreuil by Union counsel, along with the following letter:

I have your letter of April 15, 1993 and the cheque contained therein. As I am sure you are aware, I have no authority to accept membership dues on behalf of the Teamsters nor do I have any retainer to act as a messenger. I am unfamiliar with the procedures to be followed by Mr. Lauzon with respect to tendering his membership dues and I would therefore suggest that he pursue this matter through the normal channels.

You will accordingly find enclosed Mr. Lauzon's cheque being returned to you.

36. It is evident that Union officials, and in particular Mr. Papineau, the President of Local 91, were very perturbed by the fact that Mr. Lauzon chose to file with the Board and pursue the complaint to which this decision pertains. Moreover, as suggested at the hearing of this matter, in the absence of any evidence to the contrary, it is reasonable for the Board to infer that in returning that cheque to Ms. Montreuil, Union counsel was acting pursuant to his client's instructions. Having regard to all of the evidence, the Board is satisfied on the balance of probabilities that in the circumstances of this case the responding party opted to have its counsel return that cheque rather than to accept the cheque, reinstate Mr. Lauzon as a member, and restore his name to the dispatch list, in order to penalize Mr. Lauzon for having filed this complaint and participated in these proceedings. Thus, the Board finds that the responding party thereby contravened section 82(2) of the Act.

37. In view of that finding, it is unnecessary for the Board to determine whether the Union's subsequent action of freezing the list was also violative of section 82(2). It is also unnecessary for the Board to resolve the aforementioned conflicting testimony of Mr. Lauzon and Ms. Power, as there was no owner-operator work to which Mr. Lauzon could have been dispatched by Local 91 during the period from January to April of 1993, inclusive, even if his name had been restored to the list during that period. During the course of the hearing of this complaint, applicant's counsel indicated that the legality of the Union's subsequent decision to cease operating a dispatch system for owner-operators was not in issue in these proceedings. Accordingly, it is also unnecessary for the Board to make any determination in respect of that matter.

38. To remedy the aforementioned contravention of section 82(2) of the Act, the Board hereby orders the responding party:

- (i) to compensate the applicant, with interest, for all lost earnings which resulted from that contravention of the Act, and
- (ii) upon the applicant tendering payment of his outstanding dues, to restore the applicant's name to its owner-operator dispatch list, in the event that it recommences operating an owner-operator dispatch system.

39. The quantification of the applicant's loss (and the interest payable on that loss) is remitted to the parties. However, the Board will remain seized of the matter for the purpose of quantifying its remedial order and resolving any other issues which may arise regarding the implementation of that order, in the event that the parties are unable to reach agreement on those matters.

4047-93-R United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46, Applicant v. Marli Mechanical Ltd., Responding Party

Certification - Construction Industry - Membership Evidence - Reconsideration - Settlement - Union certified after entering into minutes of settlement with employer regarding description of bargaining unit and list of employees at work on application date - Employer seeking reconsideration of certification decision and relying on various grounds, including assertion that it had not received legal advice prior to signing settlement document, that it included specimen signatures for only 4 of 5 employees on the list and that it did so only after the terminal date - Employer also alleging non-sign - Board finding no basis for doubting reliability of membership evidence filed or for reconsidering its decision on any other basis -Reconsideration application dismissed

BEFORE: *G. T. Surdykowski*, Vice-Chair, and Board Members *F. B. Reaume* and *G. McMe-nemy*.

DECISION OF THE BOARD; June 2, 1994

1. By application dated May 12, 1994, the responding employer seeks reconsideration of the Board's April 13, 1994 decision certifying the applicant trade union as the exclusive bargaining agent for certain of its employees.
2. The employer pleads that it did not consent or otherwise agree to the certification of the applicant and that the Minutes of Settlement it entered into were "only" intended to "narrow the issue regarding the number of employees at work at the date of the application, and not as any kind of recognition agreement." The employer further pleads that it did not consult with a solicitor with respect to the Minutes of Settlement and was not advised to obtain independent legal advice before signing the said Minutes by either the applicant or the Board Officer authorized to deal with the matter. The employer further pleads that it did not understand the meaning or effect of paragraphs 1 and 3 of the Minutes of Settlement:
3. The employer pleads that it did not include the specimen signatures for the employees affected by this application as required by the Board's Rules but that it did send the Board specimen signatures for four employees on April 7, 1994. It pleads that it never provided the specimen signatures for a fifth individual, copy of which it submits with its request for reconsideration.
4. In support of its application, the employer also alleges that two employees have told it that they never signed any union card or application for membership, and that if another employee signed the card, he did so without understanding what he was signing.
5. Finally, the employer pleads that it had no employees at work in the industrial, commercial and institutional ("ICI") sector of the construction industry on the date of application.

6. Section 108(1) of the *Labour Relations Act* provides that:

108.-(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

Pursuant to this provision, the Board has a broad discretion to reconsider any of its decisions. However, the same provision, and legal and labour relations considerations, also demand that the Board operate from the premise that a Board decision should be final and conclusive for all purposes unless there is a good reason to change it. Accordingly, the Board will generally not reconsider a decision unless an obvious error has been made; or a request for reconsideration raises important policy issues which have not been given adequate attention or consideration; or the party requesting reconsideration proposes to adduce new evidence which it could not, with the exercise of reasonable diligence, have obtained and presented previously, and which new evidence would, if accepted, have a material impact on the decision in question; or a party seeks to make representations which it has had no previous opportunity to make. Section 108(1) of the Act is not intended to provide an opportunity for a party to reargue its case, or to present evidence or arguments which should have been put forward previously.

7. The Minutes of Settlement entered into by the parties with respect to the application for certification provide as follows:

Ontario Labour Relations Board

File #4047-93-R

Between:

United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of
the United States and Canada, Local Union 46

- and -

Marli Mechanical Ltd.

Minutes of Settlement

1. The parties agree that the following constitutes the correct description of the bargaining unit:

All plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Marli Mechanical Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

and

All plumbers, plumbers' apprentices, steamfitters and steamfitters' apprentices in the employ of Marli Mechanical Ltd. in Board Geographic Area No. 8, excluding the industrial, commercial and institutional sector of the construction industry, save and except non-working foremen and persons above the rank of non-working foreman.

2. The following constitutes a correct list of employees at work on the date of the application within the description of the bargaining units set out above:

John Abballe — Plumber
 Paul Molella — Plumber
 Tony Trumboli — Plumber
 Mike Chindamo — Plumbers' Apprentice
 Nandor Tekse — Plumbers' Apprentice

3. A formal Labour Relations Officer Report is not required.

Dated at Concord this 5th day of April, 1994.

"Vincent McNeil" "Tony Muto"
 For the Applicant For the Responding Party

8. The fact that the employer chose to deal with this matter and entered into the Minutes of Settlement without obtaining legal advice is not a basis for reconsideration. The employer chose to proceed as it did at its peril. Neither the trade union nor the Board Officer were under any obligation to suggest to the employer that it should obtain legal advice.

9. Further, this application for certification was not a complex matter. Nor are the Minutes of Settlement. The employer does not specify what it is that it did not understand about the Minutes of Settlement, and it is difficult to discern what it might have understood. The terms of the agreements arrived at by the parties, as set out in the Minutes of Settlement, are clearly expressed in plain and simple language.

10. The Board sees no reason to permit the employer to resile from the Minutes of Settlement.

11. The "various agreements between the parties" referred to in paragraph 4 of the Board's April 13, 1994 decision are the agreements with respect to the bargaining unit description, the list of employees, and the Labour Relations Officer's Report in paragraphs 1, 2, and 3 respectively of the Minutes of Settlement. The Board did not treat the Minutes of Settlement as a recognition agreement or consent to certification. However, an employer's agreement or consent is not a prerequisite to certification.

12. Upon reviewing the Minutes of Settlement between the parties, the Board was satisfied that the application could be disposed of without an oral hearing, and that it was appropriate to do so, as the Board is entitled to do under Rule 110 (made under section 104(14) of the *Labour Relations Act*.

13. In considering the application, the Board considered all of the materials then before it; namely, the application, the applicant's membership evidence and Form A-67 Declaration Verifying Membership Evidence, Construction Industry, the employer's response, including the four specimen signatures which were filed late, and the Minutes of Settlement between the parties. On the basis of those materials, the Board found it appropriate to certify the applicant. It is not open to the employer to seek reconsideration of the certification decision on the basis that it failed to file a fifth specimen signature.

14. This application for certification was made under section 146(1) of the Act, which provides that:

146.-(1) An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 119 shall be brought by either,

- (a) an employee bargaining agency; or

- (b) one or more affiliated bargaining agents of the employee bargaining agency,

on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (3) or by voluntary recognition.

There was a provincial element to the application; namely, the ICI sector part of the bargaining unit, and an "appropriate geographic area" element; namely, Board Area 8. The bargaining unit applied for is both the applicant trade union's "standard" construction industry bargaining unit, and was specifically agreed to by the employer.

15. Section 146(2) provides that:

146.-(2) If on the taking of a representation vote more than 50 per cent of the ballots cast are cast in favour of the trade unions on whose behalf the application is brought, or, if the Board is satisfied that more than 55 per cent of the employees in the bargaining unit are members of the trade unions on whose behalf the application is brought, or have applied to become members the Board shall certify the trade unions as the bargaining agent of the employees in the bargaining unit and in so doing shall issue a certificate confined to the industrial, commercial and institutional sector and issue another certificate in relation to all other sectors in the appropriate geographic area or areas.

Accordingly, it is by operation of statute that two certificates were issued to the applicant once it was found to have sufficient membership support in the *single* bargaining unit applied for; that is, one certificate for the ICI sector and another one for Board Area 8 (that is, "in relation to all other sectors in the appropriate geographic area or areas").

16. The structure of the construction industry provisions of the *Labour Relations Act* make it neither necessary nor appropriate for the Board to make determinations with respect to the sector of the construction industry in which employees were working for purposes of an application for certification under section 146(1) (see *Lyle West Electric Limited*, [1978] OLRB Rep. Nov. 999, *Pelar Construction Ltd.*, [1981] OLRB Rep. Feb. 210). Further, it is well established that so long as there are unrepresented employees at work for an employer in any sector of the construction industry on the certification application date, it is not necessary that there be employees employed in both the ICI sector and in some other sector for an application under section 146(1) to succeed and for certificates to issue under section 146(2) (*Colonist Homes*, [1980] OLRB Rep. Dec. 1729, *Pelar Construction Ltd.*, *supra*, *Watcon Inc.*, [1981] OLRB Rep. Nov. 1697). When an application is made under section 146(1), the trade union's right to certification is determined on the basis of the wishes of the employees in a single combined bargaining unit. If the application is successful, section 146(2) operates to create two bargaining units, one for the ICI sector and one for the other sectors of the construction industry. Consequently, the applicant trade union was entitled to a certificate with respect to the ICI sector whether or not there were any employees in the bargaining unit working in it on the certification application date.

17. In the Board's view, the most serious basis submitted for reconsideration is the employer's membership evidence allegations. However, the allegations with respect to Tekse Nandor are no more than speculation and do not constitute a sufficient basis to reopen the matter or reconsider its certification decision. Further, having regard to the materials before the Board, including those submitted with the request for reconsideration, and the results of the Board's usual investigation into the responding employer's allegations with respect to the other two persons, the Board is

satisfied that there is no reason either to hold a hearing, or to doubt the reliability of the membership evidence filed in support of the application for certification.

18. In the result, the Board is satisfied that there is no reason to vary, amend or otherwise reconsider its April 13, 1994 decision herein, either as requested by the responding employer or otherwise. The request for reconsideration is therefore dismissed.

0227-94-U Canadian Union of Public Employees and its Local 229, Applicant v. Marriott Management Services, Responding Party

Strike - Strike Replacement Workers - Unfair Labour Practice - Employer asserting right to have struck work performed by persons engaged, hired or transferred into pre-existing managerial positions after date of notice to bargain, so long as there is no net increase in size of employer's managerial complement - Board not accepting employer's assertion - Employer's use of various persons to perform struck found to violate Act - Complaint allowed - Cease and desist order issuing

BEFORE: *Robert D. Howe*, Vice-Chair, and Board Members *J. A. Rundle* and *R. R. Montague*.

APPEARANCES: *Sean McGee*, *Bruce Dodds* and *Harold Vandertol* for the applicant; *David Cowling* and *Jim Fougere* for the responding party.

DECISION OF ROBERT D. HOWE, VICE-CHAIR, AND BOARD MEMBER R. R. MONTAGUE: June 20, 1994

1. In a decision dated May 4, 1994, the majority of this panel, with Board Member Rundle reserving her decision, wrote as follows:

1. This is an application under section 91 of the *Labour Relations Act*.

2. For reasons which will be provided at a later date, the majority of this panel of the Board, with Board Member Rundle reserving her decision, hereby finds that the responding party has contravened section 73.1 of the Act by using Saskia Wagemans, Sandra Gilmour, Carole Smith, Linda Symonds, Colin Johnson, and Lorna Willis to perform the work of employees in the bargaining units that are on strike, and hereby orders the responding party to cease and desist from using those persons to perform that work.

The purpose of this decision is to provide our reasons for making that finding and order.

2. Section 73.1 of the Act provides, in part, as follows:

(1) In this section,

“employer” means the employer whose employees are locked out or are on strike and includes an employers’ organization or person acting on behalf of either of them; (“employeur”)

“person” includes,

- (a) a person who exercises managerial functions or is employed in a confidential capacity in matters relating to labour relations, and

- (b) an independent contractor; ("personne")

"place of operations in respect of which the strike or lock-out is taking place" includes any place where employees in the bargaining unit who are on strike or who are locked-out would ordinarily perform their work. ("lieu d'exploitation à l'égard duquel la grève ou le lock-out a lieu")

(2) This section applies during any lock-out of employees by an employer or during a lawful strike that is authorized in the following way:

1. A strike vote was taken after the notice of desire to bargain was given or bargaining had begun, whichever occurred first.
2. The strike vote was conducted in accordance with subsections 74(4) to (6).
3. At least 60 percent of those voting authorized the strike.

(3) For the purposes of this section and section 73.2, a bargaining unit is considered to be,

- (a) locked out if any employees in the bargaining unit are locked out; and
- (b) on strike if any employees in the bargaining unit are on strike and the union has given the employer notice in writing that the bargaining unit is on strike.

(4) The employer shall not use the services of an employee in the bargaining unit that is on strike or is locked out.

(5) The employer shall not use a person described in paragraph 1 at any place of operations operated by the employer to perform the work described in paragraph 2 or 3:

1. A person, whether the person is paid or not, who is hired or engaged by the employer after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
2. The work of an employee in the bargaining unit that is on strike or is locked out.
3. The work ordinarily done by a person who is performing the work of an employee described in paragraph 2.

(6) The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

1. An employee or other person, whether paid or not, who ordinarily works at another of the employer's places of operations, other than a person who exercises managerial functions.
2. A person who exercises managerial functions, whether paid or not, who ordinarily works at a place of operations other than a place of operations in respect of which the strike or lock-out is taking place.
3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.
4. A person, whether paid or not, other than an employee of the employer or a person described in subsection 1 (3).

5. A person, whether paid or not, who is employed, engaged or supplied to the employer by another person or employer.

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3. During the course of the first day of hearing of this matter on April 27, 1994, the parties agreed that the preconditions set forth in subsections 73.1(2) and (3) have been met in this case in respect of both the full-time and part-time bargaining units. They also agreed that the case should be decided on the basis of the following stipulated facts:

The six individuals in question in these proceedings are Saskia Wagemans, Sandra Gilmour, Carole Smith, Linda Symonds, Colin Johnson, and Lorna Willis.

The responding party (also referred to herein as "Marriott") operates a number of food services at Queen's University. It has retail operations and residences. It also has a main office. The residences are Leonard Hall and Ban Righ Hall. The two retail operations are at Mackintosh-Corry Hall and the University Centre.

After certification, the parties met and agreed on a number of positions being either managerial or outside the scope of the bargaining units. None of the aforementioned six individuals currently occupy bargaining unit positions; i.e., the classifications or job titles they have are not bargaining unit positions. All six positions have specific job descriptions, and up until the time of the strike the persons holding those positions were doing the work contained in the job descriptions.

Saskia Wagemans was first employed by Marriott in September of 1993 in the position of Assistant Manager at the University Centre. She replaced Maria Marques who had resigned as Assistant Manager at the University Centre in July of 1993. The reason for the delay in the replacement is that there is a material lull in the summer because Marriott serves University students. Accordingly, she was not replaced until September. That delay is the same in respect of a number of the other individuals.

Sandra Gilmour was first retained by Marriott in October 1993. She was hired as a replacement for Jenny Rabaca, who had resigned as Student Manager at the University Centre. Ms. Gilmour started out as a part-time employee. Marriott had hoped to reduce the management staff at the University Centre. However, it became apparent that they required the position of manager at the University Centre, so Ms. Gilmour was put into the position of replacing Ms. Rabaca sometime around February of 1994. Ms. Rabaca had resigned her position sometime in the summer of 1993. Ms. Gilmour was working in the bargaining unit in a part-time position until February of 1994.

Carole Smith was hired as a secretary in the main office. She was hired in September of 1993 to replace Adele Cummings, who was transferred to a secretarial position at Leonard Hall to replace Marilyn Wellwood, who had retired at the end of April of 1993. However, the transfer did not take place until the end of August, and Ms. Smith was hired shortly thereafter.

Linda Symonds replaced Alex Fasulo, who was transferred to Winnipeg to work at another one of Marriott's operations in April of 1993. Ms. Symonds was transferred from one of Marriott's operations in Newfoundland (Sir Wilfred Grenville College) in August to replace Mr. Fasulo at Leonard Hall in a managerial position.

Colin Johnson was first engaged by Marriott in September of 1993. He replaced Ken Knox who resigned in July of 1993 from the position of sous chef, which is not a bargaining unit position. (There is some question whether the sous chef position is a managerial position, but the parties are agreed that it is not included in the bargaining unit.) Mr. Knox is working somewhere else full-time, but is still retained by Marriott on an occasional basis to do sous chef work for functions such as banquets. Prior to this, Marriott retained someone else to do those banquets.

Lorna Willis came to Marriott at Queens in July or August of 1993. She is an eight year employee with Marriott. Prior to coming to Queens, she had been working for Marriott at St.

Mary's University. She replaced Christine Smith, who had the position of Manager at Marriott's operation at Mackintosh-Corry Hall. Ms. Smith was transferred to a Marriott operation in Toronto in June of 1993.

All six of the persons in dispute were replacements for persons in existing managerial positions. No new positions were created. There has been a reduction in the total complement of managers at Marriott's operations at Queen's University since April 8, 1993, which is the date on which notice to bargain was given in respect of the full-time bargaining unit. There has also been some reduction in the total complement of managers since June 8, 1993, which is the date on which notice to bargain was given in respect of the part-time bargaining unit. (Counsel for the responding party advised the Board that since April of 1993, two managerial positions have been eliminated at Leonard Hall, two managerial positions have been eliminated at Ban Righ Hall, one managerial position has been eliminated at Mackintosh-Corry Hall, and one full-time supervisor at the University Centre has had her hours cut from full-time to part-time. Counsel for the applicant advised the Board that his client agrees that there has been a reduction in the number of managerial positions. He also advised the Board that although his client is not in agreement with the numbers asserted by Marriott in that respect, it is prepared to refrain from disputing them for the purposes of these proceedings, without prejudice to any other proceedings.)

Mackintosh-Corry Hall is Marriott's largest retail operation. Leonard Hall is its largest residence operation. Lorna Willis occupies the most senior managerial position at Mackintosh-Corry Hall, i.e., there is no other managerial position overseeing her there. Linda Symonds occupies the most senior managerial position at Leonard Hall. Both Ms. Willis and Ms. Smith have occupied those positions since the dates that they came to work for Marriott.

4. Since time constraints precluded the Board from completing the hearing of this matter on April 27, 1994, and since the Board found it appropriate to adjourn the continuation of hearing scheduled for April 28, 1994, the hearing of this matter continued on May 2, 1994. At the commencement of the continuation of hearing on that day, counsel for the responding party provided the Board with a copy of an application which he had been advised was soon going to be filed by an employee named Victor Carquez, calling into question the legality of the strike vote conducted by the applicant (also referred to in this decision as the "Union"). On the basis of that information, he requested that the instant application be adjourned until such time as a decision had been rendered in respect of that application. After hearing and recessing to consider the submissions of the parties in respect of that request, the Board made the following unanimous oral ruling:

Having regard to all of the circumstances, we find it appropriate to proceed today as scheduled with argument in this case on the basis of the facts agreed to by the parties last Wednesday, during the first day of hearing of this matter. Those facts include an agreement between these two parties that the three conditions set forth in section 73.1(2) of the Act have been satisfied in the circumstances of this case. Although counsel for the responding party has brought to our attention an application which it is his understanding will soon be filed with the Board by Victor Carquez and which may call into question the legality of the strike vote conducted by the Union, there is no certainty that the application will in fact be filed nor that if filed, it will proceed to hearing and ultimately be successful. If that does in fact occur, it may ultimately have some effect on the enforceability of any order which the Union may obtain in the present case. However, we are satisfied that a ruling concerning the propriety of the responding party's using as replacement workers the six persons in question in these proceedings will serve the useful purpose of providing the parties with guidance on that important issue, and will ensure that the Union is not unnecessarily prejudiced by any delay on the part of Mr. Carquez in raising with the Board the legality of the strike vote conducted by the Union on March 8, 1994. Accordingly, the responding party's request that these proceedings be adjourned is hereby denied.

5. Counsel for the responding party then requested the Board to give his client "an automatic right of reconsideration in this matter". After hearing his submissions in support of that request (and advising applicant's counsel that it was unnecessary to hear from him on that matter), we indicated that we were not prepared to rule on that request as we were of the view that it was

premature. We further indicated that if the application succeeded and Marriott was so advised, it could file an application for reconsideration, as could any party in proceedings before the Board. We also indicated that whether such application would be entertained by the Board and ultimately granted was not a matter which needed to be determined at that time.

6. The issue the Board is called upon to determine in these proceedings is whether an employer is legally entitled in a situation governed by section 73.1 to use, in performing the work described in paragraphs 2 and 3 of subsection 73.1(5), persons hired or transferred into pre-existing managerial positions (or other pre-existing positions excluded from the bargaining unit) after the date on which notice to bargain was given, so long as there is no net increase in the size of the employer's managerial complement. Counsel for the responding party urged the Board to give section 73.1 a purposive interpretation which would enable the employer to use managerial replacements to perform such work irrespective of when the replacements were hired (or transferred from other parts of the employer's operation), so long as there was no net increase in the size of the employer's managerial complement. In support of that position, counsel referred to the Board's decision in *Canada Stamping and Dies Limited*, [1994] OLRB Rep. Mar. 213. (He also referred the Board to comments made by the Minister of Labour in the Legislature on November 28, 1991, a Ministry of Labour News Release dated November 5, 1992, and a summary sheet prepared by the Ministry of Labour regarding "Changes to Proposed Labour Relations Act Reform". However, we have not found those materials to be of any assistance in deciding this matter, as they are quite general in nature and do not address the issue which is before us for decision in this case.)

7. Counsel for the employer argued that "person" is an ambiguous term in the context of subsections 73.1(5) and (6), and urged the Board to construe it as referring to a position rather than an individual. Counsel for the applicant, on the other hand, submitted that there is no ambiguity in the pertinent provisions, and further submitted that they clearly preclude the responding party from using the individuals in question to perform the work of employees in the bargaining units that are on strike. It was his contention that this result flows not only from the plain meaning of the language of the section, but also from a purposive interpretation of that language. In support of his position, he referred the Board to *Famous Players Inc.*, [1993] OLRB Rep. Dec. 1270; *The Canadian Red Cross Society Ontario Division*, [1994] OLRB Rep. Jan. 34; and *Famous Players Inc.*, [1994] OLRB Rep. Feb. 131.

8. The purpose of section 73.1 was described by the Board as follows in *Famous Players Inc.*, [1993] OLRB Rep. Dec. 1270:

42. The purpose of section 73.1 is to inhibit a struck employer's ability to carry on business. The Legislature has decided that it is appropriate to enhance the union's power to wage a successful strike, by limiting the means open to an employer to resist. When bargaining unit members withdraw their labour, the employer is prohibited from drawing upon specified pools of replacement labour (bargaining unit members who don't support the strike and may wish to work, employees from other locations, managers from other locations, transferees after the notice to bargain is given, the employees of a subcontractor, volunteers, etc.). Section 73.1 is not confined to "strike breakers" in the traditional sense. It encompasses a wide variety of potential sources of substitute labour. It is substitute labour or "replacement workers" that is the focus of the section, and it is in that light that one must consider the concept of bargaining unit work: the Statute prohibits employers from using replacement workers to get the strikers' job done.

9. In *Canada Stamping and Dies Limited*, *supra*, the Board was called upon to determine (among other things) whether after notice to bargain had been given, the promotion of a person employed in the bargaining unit to a newly created managerial position contravened subsection 71.1(5). To resolve that issue, the Board was required to determine whether the change in that

person's status fell within the purview of the term "engaged". In concluding that it did, the Board wrote, in part, as follows:

The Meaning of Engaged

11. Section 73.1(5) provides that an employer shall not use a person who is "hired or engaged" after, on our facts, the date of the notice to bargain, to do the work of an employee in the bargaining unit which is on strike. It is clear that this section demonstrates a general legislative intention to limit the employer's use of new people to do the work of striking employees. Union counsel referred to this as a "shapshot" taken at the earlier of the notice to bargain or the commencement of bargaining, which is then frozen if a strike takes place. Because of the issues before me concerning occasionals and a newly created position filled by an existing employee, it is necessary to consider what the legislature meant by using the word "engaged" in addition to the word "hired".

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14. There are several plain meanings of the word "engaged". They include the idea of occupied or employed in a non-specific sense, e.g., the parties are engaged in bargaining, or the man is engaged in operating a press. As well, engaged has the sense of commitment to a specific end, such as engaged to be married. It also has a common sense [meaning] quite akin to "hired". But presumably the legislature was not just being repetitious, and intended something different than "hired" when it used the phrase "hired or (usually a disjunctive word) engaged". Engaged is used in the passive voice, i.e. the person is engaged by the employer, but the statute does not further qualify the term. It is clear that it was meant, at least, to cover persons who were not paid, as the employer argues. However, there is nothing in the section to indicate that it is limited to that meaning. We are of the view that an appropriately purposive interpretation of the word in context includes contracting with a person for a specific task or discrete period of time. We will deal with its application to the people in dispute below.

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27. The union argues that a promotion to a newly created position falls within the meaning of the word "engaged"....

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32. The company's position is that Mr. Yeoman was offered a promotion and accepted, and that nothing in the Act prevents him from continuing....

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34. Having carefully considered the parties arguments, I am persuaded that the filling of this position, which never existed before, is a circumstance covered by the phrase "hired or engaged". Although the legislation does not list that particular eventuality, we are of the view that it was not necessary. The general word is broad and it is sensible that the legislature did not attempt to anticipate every fact situation. It is very clear that if a new management position had been created and filled by someone not already in the employ of the company, it would be covered by section 73.1(5). We are not of the view that, from a purposive point of view, it should matter whether the position is filled from individuals who had been working in a different position for the employer, or by a new employee. Section 73.1(5) seems squarely aimed at "extra" people, people beyond the employee complement in place at the date of notice to bargain. It is not clear that the section was meant to focus on the individual identity of the person in question. From a purposive point of view, the size of the complement available to do the work of the striking workers seems more central. Creating and filling an extra position in management directly before a strike, especially when the job purports to bring with it work of employees in the bargaining unit, appears to be at odds with the purpose and general scheme of the replacement worker provisions set out above. As it was put in *Famous Players Inc.*, cited above, at paragraph 42, the statute prohibits employers from using replacement workers to get the strikers' job done.

35. Taking this purposive approach, the Board is of the view that although Mr. Yeoman, as an individual, had been hired before the date of notice to bargain, no one had yet been engaged to fill the new management position. We note that the legislature saw fit to specify, as it did not do elsewhere in the statute, that the word "person" in section 73.1 includes a person exercising managerial functions. Mr. Yeoman's engagement in early 1994 to do the duties of the new management position, in our view, makes him a person who cannot be used to do either the work of an employee in the bargaining unit on strike, or the work of anyone who is performing that work. (We note that the issue of the filling of a management position existing at the time of the notice to bargain was not before us, nor is it necessary to decide here). Thus, Mr. Yeoman should not be used to do the work of an employee in the bargaining unit, such as operating the presses, or any of the work ordinarily done by other managers such as Terry Haines, who are doing bargaining unit work during the strike, in light of sections 75.1(5), 2 and 3. If there is work involved in the newly created position that, before its creation, was not ordinarily performed by any other manager, who is doing bargaining work during the strike, Mr. Yeoman is entitled to perform that work during the strike.

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10. We respectfully agree with that analysis and conclusion. However, that decision is of only limited assistance in the instant case as, with the exception of Sandra Gilmour whose situation will be discussed below, it is unnecessary for the Board to determine whether the individuals in question were "engaged" by the responding party after notice to bargain was given. Since the word "hired" and the word "engaged" are joined by the disjunctive word "or", it is only necessary for the Board to determine whether a person was "engaged" (within the meaning of paragraph 1 of subsection 73.1(5)) by the employer after the pertinent date if the circumstances do not warrant a finding that the person in question was "hired" by the employer after that date.

11. In the present case, notice to bargain was given in the Spring of 1993. Saskia Wagemans, Carole Smith, and Colin Johnson each commenced their employment with the responding party in September of that year. Thus, it is quite clear that each of them is a person "hired" by the employer after notice to bargain was given. Accordingly, Marriott is precluded by subsection 73.1(5) from using them to perform the work in question. Moreover, although Linda Symonds and Lorna Willis were hired by Marriott prior to the giving of notice to bargain, they were working at two of the employer's other places of operations and were not transferred to the place of operations in respect of which the strike is taking place until after notice to bargain was given. Thus, the responding party is precluded from using them to perform the work in question by virtue of subsection 73.1(6) which, as noted above, provides in part as follows:

The employer shall not use any of the following persons to perform the work described in paragraph 2 or 3 of subsection (5) at a place of operations in respect of which the strike or lock-out is taking place:

• • • •

3. An employee or other person, whether paid or not, who is transferred to a place of operations in respect of which the strike or lock-out is taking place, if he or she was transferred after the earlier of the date on which the notice of desire to bargain is given and the date on which bargaining begins.

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12. If the Legislature had intended to permit employers to perform the work described in paragraphs 2 and 3 of subsection 73.1(5) by using persons hired or transferred into managerial positions after the date on which notice to bargain was given so long as the employer did not thereby increase the size of its pre-existing managerial complement, it could easily have so enacted. For the Board to ignore the plain and unambiguous meaning of the word "hired" in para-

graph 1 of subsection 73.1(5) and the word “transferred” in paragraph 3 of subsection 73.1(6), and create by means of a strained and artificial interpretation of those terms the scheme advocated by employer’s counsel, would be to thwart the obvious intent of the Legislature.

13. Thus, for the foregoing reasons, we are of the view that the responding party is precluded by section 73.1 from using Saskia Wagemans, Carole Smith, Colin Johnson, Linda Symonds, and Lorna Willis to perform the work described in paragraphs 2 and 3 of subsection 73.1(5) of the Act. It remains for us to determine whether the employer is also precluded by that provision from using Sandra Gilmour to perform that work.

14. As noted above, Ms. Gilmour was hired by the employer as a part-time employee prior to the giving of notice to bargain, and worked in the part-time bargaining unit until February of 1994 (i.e., many months after notice to bargain had been given). In February of 1994, she was promoted to a pre-existing managerial position to replace a Student Manager who had resigned in the summer of 1993 (i.e., after notice to bargain had been given). Thus, she was neither “hired” after the pertinent date (within the meaning of paragraph 1 of subsection 73.1(5) of the Act) nor “transferred” after that date (within the meaning of paragraph 3 of subsection 73.1(6) of the Act). Consequently, the Board must determine whether or not she was “engaged” by the employer after that date (within the meaning of paragraph 1 of subsection 73.1(5)). Adopting an extension of the purposive interpretation tentatively suggested by the Board in *Canada Stamping and Dies Limited*, *supra*, might lead the Board to conclude she was not, and that she consequently falls outside the ambit of that provision, as her promotion did not enlarge the size of the employer’s managerial complement beyond that which existed at the time notice to bargain was given. Although this is a possible interpretation of that provision, it is not one which we are inclined to adopt, as it would lead to the anomalous result of the employer being able to perform the work in question using a person promoted out of the bargaining unit and into a managerial position after the date on which notice to bargain was given, but being unable to so use a person hired or transferred into such position after that date. Since we are unable to divine any legitimate policy reason for construing paragraph 1 of subsection 73.1(5) in such manner as to create that anomaly, we are of the view that a more reasonable interpretation of that provision is one which avoids its creation. Thus, in the circumstances of the instant case, we are satisfied that an appropriate purposive interpretation of the word ‘engaged’ in the context of subsection 73.1(5) warrants the conclusion that when the responding party promoted Ms. Gilmour out of the part-time bargaining unit and into the position of Student Manager in February of 1994, she became a “person ... engaged by the employer after the ... date on which notice of desire to bargain [was] given”, within the meaning of that provision. Consequently, we are of the view that the responding party is precluded by subsection 73.1(5) from using Sandra Gilmour to perform the work described in paragraphs 2 and 3 of that subsection.

15. Thus, it was for the foregoing reasons that the majority of this panel, with Board Member Rundle reserving her decision, made the finding and order set forth in the above-quoted decision dated May 3, 1994 in this matter.

DECISION OF BOARD MEMBER J. A. RUNDLE; June 20, 1994

1. The purpose of section 73.1, which was aptly described by the Board in *Famous Players Inc.*, 1993 OLRB Rep. Dec. 1270 and is included in the majority decision at page 12, bears repeating here:

42. The purpose of section 73.1 is to inhibit a struck employer’s ability to carry on business. The Legislature has decided that it is appropriate to enhance the union’s power to wage a successful strike, by limiting the means open to an employer to resist. When bargaining unit members withdraw their labour, the employer is prohibited from drawing upon specified pools of replace-

ment labour (bargaining unit members who don't support the strike and may wish to work, employees from other locations, transfers after the notice to bargain is given, the employees of a subcontractor, volunteers, etc.). Section 73.1 is not confined to "strike breakers" in the traditional sense. It encompasses a wide variety of potential sources of substitute labour. It is substitute labour or "replacement workers" that is the focus of the section, and it is in that light that one must consider the concept of bargaining unit work: the Statute prohibits employers from using replacement workers to get the strikers' job done.

2. The *Labour Relations Act* was premised on a system of economic sanctions in which both parties had much to lose through confrontation and everything to gain by compromise. The former Act restricted the use of economic sanctions but did not prohibit them. The right to strike or lock-out, and the employer's ability to stand a strike are basic features of Ontario's industrial relations systems. In 1968 the Woods Task Force reported that:

As noted elsewhere, the employer's economic sanction equivalent to the union's right to strike rarely is the lock-out. It is his ability to take a strike.... However, it is important to note that an employer's capacity to take a strike depends largely on his right to stockpile goods in advance of a strike and to use other employees and replacements to perform work normally done by strikers. Together with the lock-out, these possibilities constitute the employer's quid pro quo for the employee's right to strike; this is as it should be in our view.

3. The *Labour Relations Act* as amended by Bill 40 has almost completely eliminated the employer's economic sanction equivalent to the union's right to strike, thereby dramatically altering the balance of power in the Act. The reason given for the realignment of this balance of power was the belief that the failure to put restrictions on the use of replacement workers can lead to bitter and violent confrontations and reduce the willingness of both parties to engage in meaningful collective bargaining. However, I am unaware of any documentation supporting the proposition that Ontario's experience with the picket line is in any way beyond the average. The province of Quebec has similar legislation which was preceded by a series of violent confrontations on the picket line. It is interesting to note that in the time frame in which this particular legislation has been in effect, Quebec has suffered a higher number of strikes than Ontario.

4. In the instant case we have a company which after notice to bargain was given, *reduced* its complement of managerial positions and over a period of months hired or transferred into those managerial vacancies the employees who are the subject matter of this application. None of the six individuals in question occupy bargaining unit positions and all, up until the time of the strike, were doing the work contained in their specific job descriptions. These employees were never hired as substitute labour or replacement workers as understood in the labour relations sense. At no time immediately before or after the strike did the employer seek to increase the complement of managers within its organization. Rather the employer maintained the status quo that was in existence prior to the commencement of the strike, and ran the operation during the strike utilizing only those people in the pre-existing managerial positions.

5. It was clearly the intent of the Legislature to inhibit an employer's ability to carry on business during a strike, as evidenced by the manner in which section 73.1 is written. Any employer who during the course of a strike has a manager die, discharges a manager for just cause, discharges a manager for a violation of any statute (including the *Human Rights Code* and the *Occupational Health and Safety Act*), or has a manager quit, can hire or transfer someone to fill that vacancy, but is prohibited from using him or her to perform any work of the bargaining unit for the duration of the strike. Although that is clearly the intent of the legislation, in my view it makes little labour relations sense and creates an obvious inequity which the Board is unfortunately not in a position to redress.

0823-92-U Southern Ontario Newspaper Guild, Applicant v. Metroland Printing, Publishing and Distributing, Responding Party

Interference in Trade Unions - Unfair Labour Practice - Employer prohibiting wearing of union buttons on threat of discipline violating the Act - Application allowed

BEFORE: *M. A. Nairn*, Vice-Chair, and Board Members *R. W. Pirrie* and *P. V. Grasso*.

APPEARANCES: *Stephen Krashinsky* and *Lorne Slotnick* for the applicant; *Harvey Beresford* and *Brenda Biller* for the responding party.

DECISION OF M. A. NAIRN, VICE-CHAIR AND BOARD MEMBER P. V. GRASSO, June 15, 1994

1. This is a section 91 complaint alleging that the responding party (the “employer”) has violated sections 3, 15, 65, 67, and 71 of the *Labour Relations Act* (the “Act”). At the outset of the hearing, the panel dismissed the allegation of a violation of section 15 of the Act on the basis that the particulars filed did not support an arguable case for a violation of that section.
2. The gist of the dispute is very narrow. It raises an issue of whether or not, in particular circumstances during working hours, members of the bargaining unit are entitled to wear buttons supporting the applicant (the “union”). The limited nature of the dispute can be better understood following a review of the background leading up to this complaint.
3. The employer is in the business of selling newspapers. Included in the Metroland “chain” are some twenty-five local community papers, originating throughout southern Ontario, and which are distributed from one to three times a week, depending on the paper. Each paper is locally managed by a Publisher, although there is centralized management through an Executive Committee and the President of the company. Each paper has its own editorial, advertising, distribution, administrative, and sometimes production departments.
4. The union represents a bargaining unit of editorial employees throughout the chain that includes primarily reporters, editors, and photographers. The unionized workforce now represents about eight percent of the total workforce. The great majority of the work of the bargaining unit is done in the papers’ offices, with the exception of reporters and/or photographers attending at various public meetings or holding interviews. Depending on the reporter, they may be out of the office from approximately once to six or seven times over a two week period. Reporters are generally assigned to a “beat”. For example, health care would include covering the local Hospital Boards or public health. Other beats include crime (and the courts), municipal or regional councils, and education. Interviews are conducted and photographs are taken in the office as well. Many interviews take place over the phone.
5. At the time of this dispute the parties were engaged in their third set of negotiations (the “1992 round”) and were nearing their legal strike/lockout deadline. On June 3, 1992 the union issued certain material to its members in preparation for a strike. Included in the package was a button about two inches in diameter, bearing a picture of a dinosaur and the words “Metroland Journalists, Save Us From Extinction, Southern Ontario Newspaper Guild”. The union’s main priority in the negotiations was job security. It would appear that since certification, the bargaining unit has shrunk by almost one-half due to lay-offs and cut-backs.

6. Members of the bargaining unit were asked in the material to wear the button starting June 8, and to continue to wear it until a settlement was reached. The memo went on to say:

... Management may request you to remove your button -- particularly if you are going out on an assignment -- but management legally has no power to discipline anyone for wearing a union button. If a manager requests you to remove a button, politely reply that you have the right to wear it, and ignore the request.

7. That memo came to the attention of Brenda Biller, the employer's Director of Human Resources. In response, she forwarded a memo dated June 9, 1992 to the Publishers as follows:

RE: Guild Buttons

As was the case during our prior negotiations with the Guild, Union buttons may be worn by editorial employees *except* when they are meeting with members of the public on company business.

The Guild have informed members that they legally have the right to wear these buttons at any time. Further they are to politely refuse to remove them when asked by management to do so.

Should you be faced with an editorial employee who refuses to comply with our rule regarding buttons, you are to proceed with appropriate disciplinary action:

1. A verbal warning
2. A written warning which should outline the request, date and time, the prior request and verbal warning, continued refusal to obey an order resulting in both wilful misconduct and insubordination, that it is a written warning, and that further refusal to obey the direction of the manager (Editor) will result in further disciplinary action including suspension. Also include a general statement about the rule, as they are well aware, not being new. That it applies to any political statements of any type which may compromise both the integrity of this newspaper and journalists, which is crucial to their public image.
3. Suspension - without pay for one day

Please advise me as soon as possible of any incidents requiring discipline so I may take appropriate action with the Guild.

8. In response to the memo, the union filed this complaint. No one in the bargaining unit was actually disciplined. The parties settled their negotiations prior to the legal strike/lockout deadline of June 19, 1992.

9. The union's position in its submissions was three-fold. It argued that wearing a union button was protected union activity and that its members had an absolute right to wear them at any time. In the alternative, it argued that if that right was not absolute, the employer must establish an overriding and legitimate interest in restricting the right, regardless of any employer motive. Finally, the union argued that, either in balancing competing interests or on a more usual approach, the employer had exhibited an anti-union animus and had contravened the Act. It was the position of the union that the memo of June 9, 1992 was, on its face, indicative of motive as it was specifically directed at restricting this particular lawful union activity.

10. The employer urged the panel to be cautious in determining whether or not the wearing of buttons constituted a lawful union activity in the particular circumstances of this case. It was the employer's position that it had the right to effect a "no-solicitation" rule during working hours, and that having done so, in what the employer understood to be its legitimate business interest, it was up to the union to show that the rule somehow overstepped any necessary balancing of inter-

ests. It further argued that motive was an essential element to any finding of a violation, and that no anti-union motive was evident.

11. We will first review some of the history leading up to the complaint and then the evidence surrounding the reasons for the employer's memo. The employer argued that its June 9, 1992 memo reflected a long-standing and broadly based policy. The union argued that the June 9 position was, in essence, new and specific to union activity only. In 1985, prior to certification, a reporter for one of the largest papers, the Mississauga News, ran for mayor. Other staff at the paper wore T-shirts and buttons opposing the incumbent and supporting their colleague. Some of these were reporters who were also assigned to provide coverage of the municipal elections. As a result, the paper received complaints from other candidates concerning whether the coverage in the paper was fair and balanced. In response, Ms. Judy Hughes, the Director of Editorial at that paper issued minutes of an editorial staff meeting. Those minutes advise the editorial staff as follows:

8. Staff are not allowed to wear buttons, T-shirts or other items signifying support for any organization or individual. Soliciting support for individuals or organizations is also prohibited.

12. The employer relies on these minutes to establish its policy. These minutes were not distributed to any other paper, nor is there any evidence to suggest that the matter was ever raised or discussed at any other paper, either with management or with employees. Mr. Steve Pecar, a reporter at the Mississauga News throughout this period, and an active member of the union, has been aware of these minutes, although he testified that he understood it to apply to political activity only. The minutes themselves do not indicate such a restriction.

13. In the parties' first round of bargaining in 1987, no real issue of wearing buttons arose. Mr. Lenyk, Publisher of the Mississauga News, believed he received a call from a Publisher asking him if he could remove a union button from a bulletin board. Mr. Annan, Publisher of the Newmarket, Aurora, and Richmond Hill papers, advised him he could. He also called the advertising manager at the Markham paper (for which he was responsible) advising her to tell anyone wearing a button not to. Nothing arose as a result.

14. Mr. Lenyk saw buttons on bulletin boards and on desks at the Mississauga News. He asked Ms. Hughes to tell Guild members not to display them and all were aware of a "Mutt and Jeff routine" occurring, a repeated cycle of buttons coming down and going up. Ms. Hughes saw buttons being worn and displayed and testified she told employees at a staff meeting not to. She recalled speaking to Ed Piccinin as they had a heated discussion and he initially refused to comply. She recalled another heated debate with another employee, Michael Lightstone, (which on the evidence, seems more likely to have occurred in this 1987 round).

15. In 1989, during the parties' negotiations, Ms. Biller received calls from a couple of Publishers asking her for advice about what to do concerning the appearance of union buttons. Having arrived at Metroland in 1988, Ms. Biller was unaware of the position of the employer and contacted Mr. Bruce Annan and Mr. Ron Lenyk for their opinion. The Newmarket and Mississauga papers are two of the larger papers and both individuals have a long history of service with Metroland and the papers' predecessor owners. Both were of the view that no paraphernalia of any kind should be worn at any time during working hours. Mr. Lenyk was of the view, it seems, that it would be inappropriate to show support for any cause at any time, in that it would interfere with his view of appropriate journalistic standards.

16. Ms. Biller considered their views, reviewed some caselaw and recommended to Metro-land's President that a complete ban on the wearing of union buttons was too restrictive. She recognized that the union and its members had a right to engage in lawful activity in support of the union. In her view, it would be appropriate to allow employees to wear or display the buttons in the office, so long as they did not wear the buttons while outside the office on assignment. She also recognized, as did Mr. Annan, that the employer could not dictate the off-duty conduct of the employees on this issue.

17. Although both Mr. Annan and Mr. Lenyk disagreed with this approach, it was accepted by the President. Ms. Biller notified the Publishers who had called her, and although it was suggested that all Publishers were informed, the evidence does not support that broad a conclusion. There is no evidence that any employees were informed of this policy. The union was not formally notified. Mr. Slotnick, the union's spokesperson in negotiations and the local representative, testified there had been no discussion of this rule and that he had learned of it for the first time following the June 9, 1992 memo. Ms. Biller did not dispute his recollection. However, other than these company discussions, the wearing of buttons did not become an issue in the 1989-90 round of bargaining.

18. The employer's evidence seemed to suggest that the reason no issue was raised about the wearing of buttons or the employer's policy in earlier rounds was because buttons were not being worn. Mr. Annan recalled members of the union's bargaining committee wearing buttons at negotiations in 1987. In cross-examination he stated he recalled seeing buttons being displayed in the 1989 round, but not the circumstances. Mr. Lenyk saw buttons on bulletin boards and desks in 1987, and recalled none in 1989. Ms. Hughes did not recall any incidents from 1989 and was unaware of any change in policy until the 1992 memo.

19. The union led evidence to establish that employees had worn buttons both in and out of the office while on assignment during all rounds of bargaining. Rick Vanderlinde, from the New-market paper, Carol Baldwin, from the Burlington paper, and Steve Pecar, from the Mississauga paper each testified that in each round of negotiations they wore their button both in and out of the office on work time without comment from management. They also observed other employees in the bargaining unit wearing the buttons when leaving on assignment and Rick Vanderlinde worked with a photographer on assignment on two occasions that he could recall where the photographer also wore a button. In no case was there any attempt to hide what they were doing.

20. We are satisfied that at least some employees wore buttons in the earlier rounds of bargaining both in and outside the office. Although Mr. Annan and Mr. Lenyk had little recollection, in addition to the unchallenged evidence of the employees, there was the evidence that triggered Ms. Biller to investigate the issue in 1989, that of Publishers having seen buttons displayed. What is clear is that the employer did not clearly indicate its position throughout its organization or seek to pursue the issue with either the employees or the union until the memo of June 9, 1992.

21. Mr. Annan and Mr. Lenyk testified as to the employer's reasons for limiting the wearing of buttons. They both commented on their view as to the appropriate conduct of a reporter (or photographer) in the conduct of interviews. It was their expectation that reporters remain neutral when covering stories for the papers. Both felt strongly that paraphernalia such as buttons or T-shirts which supported a cause would interfere with the reporter's ability to gather information. An interview subject might perceive the reporter to be biased or lacking in impartiality, and react either negatively or positively to that perception. Mr. Annan testified that the only thing a newspaper has for sale is its credibility, which in large part flowed from the integrity and independence of

the journalists who represent the paper. Mr. Annan stated that their feeling was that wearing a union button "indicated a certain political outlook and certain viewpoint" which might well make people interviewed or photographed uncomfortable or conversely, overly comfortable.

22. In cross-examination Mr. Annan stated that readers have to believe and trust what they read- that there are "no axes to grind" in their papers. Journalists must not be seen to be taking sides because "perception is reality". In that the paper "rents" its readership to its advertisers, it is essential to maintain readers in order to maintain advertisers and thereby the business.

23. In cross-examination Mr. Annan agreed that as a practising journalist at the Oshawa paper he wrote columns (with a by-line) and editorials (without a by-line) expressing particular points of view, while at the same time editing news stories on the same subject matter. He distinguished this activity on the basis that he was not the one doing the interview and therefore the story gathering process was not jeopardized by any sense of a lack of impartiality. As an editor he asserted an ability to distance himself from the subject - to edit through a "screen of impartiality".

24. Mr. Annan and Mr. Lenyk do not belong to any group or organization because of their concern that as a member they might be placed in a position of being asked to provide favourable publicity or to avoid negative publicity for that group and potentially jeopardize their relationship with other groups or organizations. However the Newmarket paper is a member of the local Chamber of Commerce and the Director of Advertising for the paper is currently its President. Mr. Annan justified this association on the basis that it was critical to the success of the paper to have a close association with its advertisers. He acknowledged that the paper has written stories about the organization and about advertisers.

25. He acknowledged that his paper had endorsed candidates, or a slate of candidates running for political office, and had told readers how the paper thought they should vote in the constitutional referendum. The papers published a full-page "open letter to the Minister of Labour" urging the government to abandon the amendments proposed by Bill 40. Mr. Annan was of the view that if the paper felt something jeopardized their ability to operate it was okay for the business to make that known. In response to the question of whether the printing of that letter might affect a trade unionist being interviewed for the paper, he responded by pointing out that the reporter, if seen as impartial, could assure the interview subject that the reporter could get both sides of the story before the public. He acknowledged however that a Publisher and ultimately the owner of a paper has the right to refuse to publish a story. He drew a distinction between the editorial pages or columns and the news pages of a paper. The former expresses opinions of the paper or individuals, the latter ought not.

26. The employer relied on evidence of two complaints giving rise to its concern about the papers' "impartiality". There was the incident in Mississauga leading to the 1985 minutes. In addition, in 1980 or 1981 a labour reporter in Oshawa was approached by the Oshawa District Labour Council over the fact that he was not driving a General Motors (G.M.) product, thereby showing a lack of support. The reporter raised the issue with Mr. Annan (then the editor-in-chief at that paper) who suggested that next time he consider buying a GM product, although he could not tell the reporter what to do. This evidence shows, perhaps, a sensitivity to the community served. The perceived "lack of support" however might reflect on all participants, the manufacturers, its employees and the community where the manufacturer plays an important economic role. It is difficult to draw any conclusion about how anyone in the community from the automotive industry, who was interviewed by the reporter, would "perceive" the coverage. Yet interestingly, Mr. Annan's reaction was in essence, to suggest that the reporter consider "aligning" himself with that interest in future.

27. Carol Baldwin regularly wears three different buttons while out on assignment. They reflect issues of sexual assault and equality for women. She is the "life" editor at the Burlington Post. She has written stories concerning these issues. In cross-examination, it was suggested that she writes these pieces from a particular viewpoint and that they are therefore more in the nature of opinion pieces. While agreeing that the stories were generally "features", she disagreed with their characterization as comparable to columns or editorials. She has never been told to remove the buttons although members of management at the paper are aware she wears them.

28. Possible conflicts of interest have been dealt with by the papers. Mr. Vanderlinde, at the Newmarket paper, ran for school trustee. He had been assigned to the education beat, covering the School Board. While running for office and for a period of about a year afterwards, he was assigned to cover a different beat. He subsequently returned to the education beat. A reporter at the Mississauga News, Mark Holmes, had joined the Liberal Party. His assignment would have included coverage of any election. His assignment was changed and some time later Mr. Holmes rescinded his membership.

29. There was no example of a reporter being called on to cover a story concerning the collective bargaining between these parties. There was no example where any reporter might cover a story concerning labour relations issues and be wearing a union button.

30. The Mississauga News has printed a front page news story concerning the negotiations between these parties without contacting the union. Included in that story was the statement "The Mississauga News will continue to publish its regular editions in the event of a newsroom labour disruption". The comment is not an attributed opinion. Mr. Slotnick testified that the union's position was that the ability of the employer to continue operating would have been jeopardized, had it been asked.

31. Mr. Annan agreed with union counsel that the test for balance and accuracy in a story is the final product. He was concerned however that an important voice in the story might refuse to deal with a reporter because of claimed visible support for an organization with which that person might not agree. However, underlying Mr. Annan's comments also lay another concern, expressed when he stated that when a reporter is out preparing a story he is representing the paper, not the reporter's own particular viewpoint. He went on to state that by wearing a button, discussion of a "particular agenda" may occur, which he believed was hurtful to the individual reporter, to the paper's chances of getting an interview, and hurtful to the paper's economics as well. In his view, by wearing the button concerning collective bargaining, a reporter could be perceived as acting contrary to the economic interests of the employer.

32. Mr. Annan's concern that discussion of collective bargaining might occur was, not surprisingly, confirmed by the union's evidence. The parties were nearing the conclusion of bargaining and the union was using a variety of strategies to increase the pressure on the employer in the negotiations and to enhance public awareness of the dispute. As Mr. Slotnick testified, a community newspaper is a very public product. It enjoys high visibility in the community and the public's interest can be high.

33. The union's reasons for using a button were two-fold. One reason was to increase solidarity among the members of the bargaining unit. The other was to enhance awareness of the dispute, both among the remaining non-unionized workforce and with the public. The union witnesses expressed the hope that by wearing a button, members of the public would inquire into its meaning and that thereby, reporters could discuss the dispute and the union's position in the negotiations.

34. The employer argued that in this context, the wearing of the button could not be seen as protected activity. The employer's concern that there may be an interference with work performed during working hours if discussion of the negotiations is ongoing, seems at first blush a legitimate one. The employer's witnesses however, were also keenly aware of a possible increase in pressure on them in collective bargaining if reporters were able to advance the position of the union with the public. Mr. Lenyk had difficulty in distinguishing the wearing of buttons from other strategies engaged in by the union directed at advertisers.

35. Our consideration begins with an outline of the statutory framework within which we make our determination. This matter arose prior to the amendments to the Act in January 1, 1993 but the relevant provisions remain essentially unchanged. The applicable preamble to the Act stipulated that encouraging collective bargaining was a matter in the public interest, which statement of policy continues in what is now section 2.1, paragraphs 1 and 2 of the Act.

36. The other relevant statutory provisions (continued without substantive amendment) are set out below:

3. Every person is free to join a trade union of the person's own choice and to participate in its lawful activities.

65. No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

67. No employer, employers' organization or person acting on behalf of an employer or an employers' organization,

- (a) shall refuse to employ or to continue to employ a person, or discriminate against a person in regard to employment or any term or condition of employment because the person was or is a member of a trade union or was or is exercising any other rights under this Act;
- (b) shall impose any condition in a contract of employment or propose the imposition of any condition in a contract of employment that seeks to restrain an employee or a person seeking employment from becoming a member of a trade union or exercising any other rights under this Act; or
- (c) shall seek by threat of dismissal, or by any other kind of threat, or by the imposition of a pecuniary or other penalty, or by any other means to compel an employee to become or refrain from becoming or to continue to be or to cease to be a member or officer or representative of a trade union or to cease to exercise any other rights under this Act.

71. No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

72. Nothing in this Act authorizes any person to attempt at the place at which an employee works to persuade the employee during the employee's working hours to become or refrain from becoming or continuing to be a member of a trade union.

(previously sections 3, 64, 66, 70 and 71;)

37. Notably, section 3 establishes a freedom for employees to participate in the lawful activities of a trade union, which freedom is expressly limited only with respect to membership solicitation pursuant to section 72 of the Act. Section 72 does not authorize an employer to interfere with lawful trade union activity and both must be read in conjunction with sections 65, 67 and 71. Section 65 prohibits employer interference with the administration of a trade union or the representation of employees by the trade union, and sections 67 and 71 prohibit conduct by which a person may be inappropriately deterred from exercising any right under the Act.

38. Although the parties commence their arguments from a somewhat different point, in either case the first question to be considered is whether or not the wearing of buttons in this case is lawful union activity, which activity is promoted by the statute. It is also protected pursuant to sections 65, 67 and 71 of the Act. While the employer starts from the proposition that it has promulgated a no-solicitation rule in accordance with the outline set by the Board in *The Adams Mines, Cliffs of Canada, Manager*, [1982] OLRB Rep. Dec. 1767, that case first discusses the nature of the activity engaged in by the union. It finds that there is a distinction to be drawn between certain kinds of activity which are both protected and promoted by the statute and other activity, which, while legitimate to the furthering of trade union objectives, may not be entitled to the same statutory protection. In that case, the activity sought to be protected was the distribution of campaign literature supporting a particular political party in the context of a federal election. The Board concluded that this activity was:

too remotely connected to the dominant purpose of the *Labour Relations Act* to attract the right asserted by the complainant. In our view, the communications in issue before us are not as connected to concerns of the bargaining unit employees as they are to their concerns as voters. (para. 37)

39. While acknowledging that trade union activity involves more than just face to face collective bargaining, the Board discussed how positive statutory rights are not created simply by a trade union setting and pursuing broad objectives - that to be protected activity:

... the Board must be satisfied that the statutory right contended for is consistent with and arises out of the dominant purpose of the Act as discerned from its provisions and preamble. (para. 28)

40. And at paragraph 26 the Board stated:

26. ... the dominant purpose of the *Labour Relations Act*, as discerned from its provisions, is much more narrow and as stated in the preamble, centers on the furtherance of "harmonious relations between employers and employees by encouraging the practices and procedure of collective bargaining between employers and trade unions as the freely designated representatives of employees". To this end the statute creates an elaborate framework to allow employees to freely designate trade unions as their exclusive bargaining representatives in their relationships with their employers. Once certified, a trade union legally speaks for bargaining unit employees with respect to "terms or conditions of employment or the rights, privileges or duties of employers". ... *The Act deals with a restricted but vital area of trade union interests - the collective bargaining process. It is this dominant purpose of the statute and all related activity necessarily incidental to this purpose which demarcate the Board's jurisdiction.*

(emphasis added)

41. The Board concluded in that case that the activity in question was not so protected and it is in light of that conclusion that one must be cautious before adopting the employer's approach to the case before us. The application of the "no-solicitation" principles outlined in *Adams Mines* were, in effect, never considered in that case. The complainant had not met the first hurdle of establishing that the activity in which it was engaged was activity that was protected by the statute.

42. We note that the employer's witnesses on a number of occasions referred to the wearing of union buttons as "political" activity. The June 9 memo makes an inclusive reference to "any political statements of any type" and both Mr. Annan and Mr. Lenyk variously made reference to a concern over the expression of a particular "political" viewpoint. Expressing support for a particular position taken by one's union in a set of collective bargaining negotiations is clearly specifically addressed to collective bargaining and is easily distinguished from broad political activity. *Adams Mines, supra*, found that communications connected to concerns of bargaining unit employees as employees were to be distinguished from their concerns as voters. As noted, legitimate union activity which supports collective bargaining objectives enjoys a vital and supported role by virtue of the objectives of the statute in promoting this form of collective activity.

43. We have no doubt that a trade union and the employees it represents are generally provided protection by the statute when engaging in lawful activity that supports its collective bargaining objectives. We are further satisfied that the wearing of buttons outlining the union's key position in these negotiations was lawful activity. The button in question refers in an inoffensive and accurate way to the main issue of importance for the union in the negotiations. The employer also acknowledged that the employees were engaging in protected activity, at least in certain circumstances. It argued however, that it was not protected activity when done during working hours with a view to damaging the reputation of the employer or the bona fide interests of the employer.

44. To some extent, this puts the cart before the

horse, even on the *Adams Mines* approach because it necessarily involves consideration of any asserted employer interest which issue we return to later. In *Rosco Metals Products Ltd.* 64 CLLC 1250, the Board held that the employer had prohibited the wearing of buttons while at work (which buttons supported the union in an upcoming representation vote) in an effort to thwart the union's attempt to become the bargaining agent. The employer had suspended employees for wearing the button and was found to have violated what is now section 67(c) of the Act. The Board also concluded that the wearing of the buttons was lawful union activity as contemplated by section 3 of the Act. The panel went on to say:

... we would point out that where there is evidence that the wearing of other buttons, which because of their size or patently inflammatory message, or other forms of electioneering have caused a disturbance, violence, interference with the quality or quantity of production, interference with the rights of others, or evidence that they constitute a safety hazard or that they adversely affected the relationship of the company with its customers or suppliers or evidence of grounds which would cause one to reasonably anticipate the same, an employer may well prohibit such electioneering without contravening *The Labour Relations Act*.

45. There was no evidence in this case to support a conclusion that the wearing of buttons by employees was done with the purpose of damaging either the reputation or the business interests of the employer. The fact that the union, supported by the employees, take a different position in collective bargaining from the employer is insufficient to draw such a conclusion. The employer argued that the wearing of buttons had to be seen in the context that the union had also contacted advertisers to advise them of the dispute and suggest they seriously consider whether to advertise in the paper in the event of a strike. Although part of the union's overall strategy in the bargaining, that activity, however characterized, is distinct from the question of whether the wearing of buttons constitutes protected union activity. (And can be distinguished on its facts from *St. Catharines General Hospital*, [1982] OLRB Rep. March 441).

46. This conclusion as to the lawful nature of the activity is consistent with the analysis in *Air Canada and Canadian Air Line Employees' Association*, (1985), 19 L.A.C. (3d) 23 (Brent) and *Quan v. Treasury Board*, (1990), 90 CLLC 12,039 a decision of the Federal Court of Appeal.

While both cases arise in the context of arbitral proceedings, each considers the issue of lawful and protected trade union activity in the context of the collective agreements involved. Those agreements specifically prohibited, *inter alia*, interference in lawful activity on behalf of the union. The language of the collective agreements was very similar to the statutory protection we are dealing with. In *Air Canada, supra*, where employees wore buttons supporting their union while at work, in circumstances where some employees dealt with members of the public, the arbitrator stated:

Collective bargaining is certainly a lawful union activity. It is the legal obligation of the parties to meet and bargain in good faith toward the renewal of their collective agreement. In the course of bargaining it is certainly legitimate for the union to communicate with its members and seek their support for positions taken at negotiations. That is precisely what was done here. I therefore agree that the showing of support during bargaining through wearing a button was a "lawful union activity" within the meaning of art. 19.01.01...

47. In *Quan, supra* in reviewing two conflicting arbitration decisions, the Federal Court of Appeal preferred an analysis of that collective agreement that was consistent with the statutory objectives of then section 6 of the *Public Service Staff Relations Act*, a provision essentially equivalent to section 3 of the Ontario legislation. The Court agreed that the wearing of union buttons at work and while dealing with members of the public that stated "I'm on strike alert" was lawful union activity.

48. Having established that the employees are engaged in lawful and protected union activity, the union asserted that the Board ought to conclude that that right was absolute. We disagree. The issue was discussed in *Adams Mines, supra* and the referenced arbitral decisions. All conclude that the exercise of the right is not absolute. The employer on the other hand, argued that, having established a broadly based rule, it was incumbent on the union to show that the employer had inappropriately interfered with any lawful union right. We disagree with that proposition as well. *Adams Mines, supra*, makes it clear that it is up to the union to initially establish the interest to be protected, which in that case, it failed to do. Having established that employees were exercising a statutorily protected right, it remains incumbent on an employer to prove that it did not act in violation of the Act.

49. That approach is consistent with the reasoning in both the *Adams Mines* decision, and the decision of the Board in *International Wallcoverings* [1983] OLRB Rep. Aug. 1316 relied on by the employer. Both ultimately contemplate that neither a union's statutory rights nor an employer's property rights are absolute and it may become a question of to what extent one may be required to give way to the other. While the parties argued at some length as to the proper interpretation of these decisions and the import or not of notions of improper motive (whether inferred as a natural consequence of interference or explicit interference improperly motivated), the following comments from *International Wallcoverings, supra* are instructive:

28. To ensure that the section [referring to section 65] did not prohibit all employer initiatives impeding union activity (no matter how bona fides) the Board read into the statute an exception for employer conduct "that only incidentally affects a trade union". In this manner the Board proposed, pursuant to section 64, [now section 65] to distinguish between legitimate and illegitimate management initiatives. Presumably an adverse impact on union activity would be characterized as "incidental" where, relying on its expertise, the Board accepted the employer's action as classic business or collective bargaining activity not inconsistent with the scheme of the Act. In effect, the Board would "balance" the conflicting interests of labour and management, honouring accepted relationships but being vigilant that intrusions on statutory entitlements have suitable justifications. In fact, labour board analysis of no-solicitation rules has tended to follow [a] non-motive approach after an adverse effect has been established or inferred. ... However, we wish to stress that "the balancing" has been more one of examining the record for a legitimate management interest to support the adverse impact on union activity. It has not usually involved a delicate weighing of legitimate but conflicting interests with labour boards being the

final arbiters of the right policy mix. We know of no case in Canada or the United States in which a labour board has purported to balance a bona fides exercise of a managerial prerogative, for example, a layoff or subcontracting decision, against its impact on union activity. The no-solicitation cases have looked to identify the managerial interest in a sweeping no-solicitation rule over and above a simple reliance on property rights. Where such an interest is absent, there exists a significant imbalance in favour of the protected activity and this clear imbalance triggers a statutory violation. Indeed, this absence of a managerial interest is the same kind of a condition often justifying an inference of improper motive. The real balancing, in the no solicitation cases, has been between property rights and statutory rights. Unfortunately, this point was not made in the *A.A.S.* case which in turn gave rise to a concern within the Board itself over the viability of an unrestrained balancing approach.

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31. ... Thus the differences between the *A.A.S.* and *Skyline* decisions are not as great as may at first appear. Both approaches involve some balancing; both take into account the scheme of the Act; and, without direct evidence of motive, both approaches in effect require a considerable imbalance of interests in favour of the protected activity before a violation will be established. Unfortunately, however, it cannot be said that the requirement of motive in all claimed applications of section 64 is a superfluous detail and that both approaches always result in the same outcome. A non-motive approach to section 64, by requiring a substantial imbalance of interests, is capable of accommodating the concern that section 66 not be read out of the Act. Usually, the same imbalance will support an inference of improper motive which should negate the superiority of section 64 in the run of the mill section 89 case. On the other hand, the universal requirement of motive for section 64 can deprive the statute of the necessary flexibility to respond to certain troublesome situations which its otherwise general wording would provide.

32. For example, cases arise where employer conduct has a significant impact on protected activity and, while supported by good faith, does not reflect a persuasive or worthy business purpose. The balance between employer and employee interests may therefore strongly favour the protected activity, but the absence of a motive to interfere precludes a remedy. The no-solicitation cases are one example but not the only illustration of this problem. Indeed, the no-solicitation cases could probably be preserved on a compulsory motive test by employing a legal inference of intended interference notwithstanding the longstanding and consistent application of a no-solicitation rule without discrimination. ...

50. The employer argued that the approach in *International Wallcoverings*, *supra*, leading to a finding that section 65 had been violated in the absence of an anti-union motive that would likely also support a violation of section 67, was properly limited to rare instances of employer mistake, where a failure to remedy the circumstances would give rise to an obvious injustice. Certain facts in that case evidence such mistake. However, the Board first determined in that case that "a clear imbalance in favour of protected activity does not exist" (para. 37). It was only after engaging in a balancing exercise, having reviewed the nature of the protected activity and the rationale for, and effect of, the interference on that activity that the Board continued and addressed the concerns raised by the employer's clear mistake in that case.

51. We are satisfied that the wearing of buttons by employees regarding the union's position in collective bargaining constitutes lawful trade union activity. The employer has limited the exercise of that activity by threatening discipline should the activity occur during working hours while conducting interviews off the employer's premises. We note that even if we were to presume a rule to be, in the words of *Adams Mines*, *supra*, "presumptively valid", we still must examine the rule and its rationale.

52. There are a number of inconsistencies in the application of "the rule", the employer's stated justification for it, and the employer's conduct that have led us to conclude that the issuing of the June 9, 1992 memo was not free of anti-union motive.

53. Although the employer asserted that its policy of not allowing employees to wear paraphernalia while conducting interviews outside the office was broadly-based and of a long-standing nature, the evidence does not support that conclusion. To the extent that the employer had clearly indicated a position to the employees it was only at the Mississauga News and it was a different (albeit more restrictive) position from the one set out in the June 9 memo. Neither position was taken at the Burlington paper where Ms. Baldwin regularly and with the employer's knowledge wore buttons advocating a position. The first notification of the employer's position to all the Publishers was the June 9, 1992 memo. That memo was not communicated to the union, although it learned of it.

54. The employer asserted that the union must be taken to have been aware of its rule, given the union's instructions to members in the June 3, 1992 material. That evidence is inconclusive. Mr. Slotnick wrote the material but it was not disputed that there had been no discussion of the rule between the union and the employer until the memo was released. There is no evidence that employees were informed of the employer's position, except a somewhat general assertion that employees did not need to be told because they understood the employer's concerns. The first clear indication, the June 9 memo, is directed specifically to the issue of union buttons (although it makes a generalized reference to any political statements of any type in the memo).

55. The evidence as a whole supports a conclusion that, at best, the employer's "rule" was unclear, and had not been communicated to either the union or employees. To the extent that it had been applied, it had been applied inconsistently. Ms. Baldwin regularly wears buttons advocating a position while out conducting interviews and has been allowed to do so. The memo is directed specifically at union buttons. On those bases, it would not be unreasonable to infer an improper motive on the part of the employer in issuing its June 9 memo directed at prohibiting the wearing of union buttons or be subject to discipline.

56. However, we are also not satisfied that the reasons given for the rule withstand scrutiny. The employer interest was described as, essentially, one of protecting the papers' interest in maintaining impartiality, and a concern about the performance of work.

57. We note that the employer relied on the passage cited from *International Wallcoverings, supra*, at paragraph 28 (referring to the analysis of no-solicitation rules) to argue that the Board ought not to engage in a delicate balancing or weighing of interests between the parties; rather that we ought to look to see simply if a legitimate employer interest arises, thereby justifying a broad no-solicitation rule. However, we also note the comments of the Board in *T. Eaton Company Limited*, [1985] OLRB Rep. June 941, at paragraph 72 where the Board recognizes that a broad no-solicitation policy "does not stand on the same legal footing vis-a-vis activities which are protected by statute, and those which are not".

58. A review of the evidence with respect to the stated concern of maintaining impartiality shows a number of inconsistencies. What is at issue is whether or not the wearing of union buttons while out of the office conducting interviews interferes with any legitimate employer interest. While not suggesting that the employer may not have some interest in maintaining impartiality, its expression of concern appears to have been, at best, exaggerated.

59. The first point is that the employer has conceded, in essence, that this concern (or the concern regarding performance of work) does not arise (or can be and has been accommodated) if the interview is being conducted or photographs are being taken in the office. There is no basis for concluding that the stated concerns of the employer would not equally arise in this context. While it may be that Ms. Billings attempted a kind of "trade-off", to accommodate Mr. Annan's and Mr. Lenyk's views, it is clear that the employer has acknowledged that the wearing of union buttons in

the office will not jeopardize its credibility, even though the same work conducted outside the office is and is subject to the restriction.

60. There have also been no complaints about the wearing of union buttons, although the evidence indicates that they have been worn or displayed both inside and outside the office. More importantly, there is no evidence that any story or final product displayed any lack of balance, which the employer acknowledges is the proper test.

61. The two complaints which the employer relies on in support of its concern regarding impartiality are of a different character or have been dealt with differently by the employer. The wearing of buttons or T-shirts supporting a candidate employed at the paper during the 1985 municipal election in Mississauga, while at the same time providing coverage of that election, put the paper in direct conflict. It was not clear from the evidence whether the individual involved continued to work at the paper while a candidate. However what prompted the complaint was the fact that employees were reporting on the same story in which they were also advocating a position. The evidence shows that that kind of conflict has subsequently been dealt with by removing a candidate for school board from the education beat during and after the election campaign, or re-assigning a reporter with stated political affiliations off a political beat. To the extent there is a legitimate employer concern involving "conflicts" or "perceived impartiality" these examples suggest that those concerns can be and have been more than adequately accommodated. In this case there is no evidence that a reporter or photographer was assigned a story involving a general matter of labour relations or one involving the collective bargaining relationship between these parties. However, in such a case a similar accommodation could be made. The union witnesses agreed that in those circumstances it would be inappropriate to wear a button.

62. The second complaint relied on by the employer involved questioning the make of the car that a reporter drove. As stated already, regardless of how one might view any concern raised, the employer's response was to suggest the reporter align himself with the expressed interest. While that might be explainable in the context of supporting many segments of a community that depend heavily on GM, it does not reflect an overriding concern about the need for impartiality. As the parties recognized, anyone can take a different meaning from any action. The examples can be taken to extremes. If the employer were to suggest, for example, that the reporter perhaps not invest in a car at all, thinking that no impression may be taken, there is no assurance that a similarly negative impression could not be taken by a District Labour Council member upset over the fact that the reporter appears to prefer to walk than drive a GM product. It is in this context that the witnesses can logically be seen to have agreed that it is the final product which is the test for balance in a story.

63. That evidence therefore does not support the conclusion that the papers place the kind of weight on this issue of impartiality as suggested. They recognize at least that there are limits on what can be accomplished. They also recognize that there are other objectives that have been balanced against it. While Mr. Annan and Mr. Lenyk have chosen not to belong to or participate in other clubs or organizations, the Newmarket paper is an active member of the local Chamber of Commerce. At the same time it has written stories about it. The witnesses acknowledged that the papers also write stories in support of their advertisers. This was justified on the basis that it is in the papers' economic interests to maintain and develop these ties. The papers have taken partisan stands in elections and on political issues. The publishing of the open letter opposing Bill 40 was justified on the basis that it was in the papers' economic interest. While these activities were distinguished from news coverage, the employer's witnesses acknowledged that someone being interviewed, having read the material in the paper, might not draw such a distinction and might con-

clude the paper was not impartial, notwithstanding the efforts of the reporter to assure them otherwise.

64. There is also the example (albeit a small one) where the Mississauga News was not impartial in its news coverage, notably a story concerning the negotiations between these parties. The examples show that the employer is willing to use the papers to be publicly partisan in matters, including those involving the union and collective bargaining and is prepared to take the risk that the public will not deal with its papers because of a perceived lack of balance. All of this evidence merely highlights how speculative and subjective an assessment of this concern for impartiality is, unless the final product is used as the measure, and overall the evidence undermines the employer's expressed motive.

65. The employer's second concern was that by wearing the buttons the work of the reporters or photographers was being interfered with or was not being performed. The employer argued that the union admitted this point because its witnesses testified that they hoped people would inquire of the dispute on seeing the button and engage in discussion. There was limited evidence of any actual discussions having occurred and if any, the discussion was brief and cursory. There was no evidence that work was not completed as required. Nor did the employer suggest that it prohibited employees from having discussions with members of the public apart from the strict subject of the interview. Nor do we think, could the employer so suggest. A reporter might well discuss an unrelated subject for the purpose of putting an interview subject more at ease. There is no evidence of any general restriction on conversation nor evidence of actual interference with work performed. We are left to conclude that what irks the employer is that an employee might discuss the negotiations while on work time (which we note could well occur even in the absence of wearing a button).

66. Underlying much of the employer's evidence is the view that the union ought not to be able to further its position in collective bargaining through the wearing of buttons on company time and in the performance of work duties, to the employer's potential detriment in negotiations. The limitation on the wearing of the buttons is designed to limit, on threat of discipline, communication about collective bargaining objectives, a lawful union activity. There is no evidence that there has been any effect on the employer's ability to operate, nor is there any evidence of damage to its reputation. Discussing collective bargaining and the parties' respective positions are the normal throes of collective bargaining. The employer has utilized the opportunity to use the papers to advance its position. In addition to the examples cited in paragraphs 63 and 64, in June 1992 the Mississauga News published a letter to its readers and carriers (Exhibit 12) advising that negotiations with the Guild were ongoing and assuring them that the paper would continue to publish and to distribute advertising in the event of a failure to settle.

67. We are satisfied, notwithstanding employer counsel's very capable arguments, that in prohibiting the wearing of the union buttons while outside the office on threat of discipline, the employer acted, at least in part, with an improper motive and engaged in conduct contrary to sections 65 and 67 of the Act and we so declare.

68. Before leaving this however we feel compelled to note that although tainted, the interference effected on the union's lawful activity was, in the particular circumstances, of a minimal nature and arose in circumstances where Ms. Billings' own original efforts at least, appear to have been an attempt at balance. We are cognizant of the fact that the employer and papers seek to operate in a diverse and autonomous fashion which no doubt contributes to inconsistency. However that is the employer's choice. It may also we note, operate at times to the benefit of the

union. We would urge both parties to consider their longer term interests before seeking to pursue matters before the Board. In any event, no further remedy is warranted here.

DECISION OF BOARD MEMBER R. W. PIRRIE: June 15, 1994

1. With all due respect to my colleagues I dissent from their decision.
2. In my opinion it is not necessary that the management of the newspaper have evidence of actual interference with the performance or impact on the end result of the reporters/photographers work, or on the newspaper's ability to operate or its reputation as a consequence of the buttons being worn. The employer has a belief that button wearing by their employees while fulfilling their responsibilities outside the office, impacts on the perception of others as to the reporters/photographers and the newspaper objectivity. As such, the newspaper's policy as set out in their June 9, 1992 memorandum to their publishers was a seasoned response to their concerns. In my view those concerns and the policy directive did not in any way stem from an anti-union motive.
3. As a consequence, I do not find that prohibiting the wearing of buttons to be conduct contrary to any of the provisions of the Act.

2584-93-JD; 2658-93-JD; 2659-93-JD; 2660-93-JD; 2661-93-JD; 2662-93-JD
International Association of Bridge, Structural and Ornamental Ironworkers,
International Association of Bridge, Structural and Ornamental Ironworkers,
Local 736, Applicants v. Electrical Power Systems Construction Association,
Ontario Hydro, Canadian Union of Public Employees, Local 1000, Responding
Parties; Labourer's International Union of North America, Labourer's Interna-
tional Union of North America, Local 1059, Applicant v. Electrical Power Sys-
tems Construction Association; Ontario Hydro; and Canadian Union of Public
Employees, Local 1000, Responding Parties; International Brotherhood of Paint-
ers and Allied Trades, International Brotherhood of Painters and Allied Trades,
Local 1891, Applicant v. Electrical Power Systems Construction Association;
Ontario Hydro; and Canadian Union of Public Employees, Local 1000, Respond-
ing Parties; Ontario Allied Construction Trades Council, Applicant v. Electrical
Power Systems Construction Association; Ontario Hydro; and Canadian Union of
Public Employees, Local 1000, Responding Parties; United Brotherhood of Car-
penters and Joiners of America, United Brotherhood of Carpenters and Joiners of
America, Local 2222, Applicant v. Electrical Power Systems Construction Associ-
ation; Ontario Hydro; and Canadian Union of Public Employees, Local 1000,
Responding Parties; United Brotherhood of Carpenters and Joiners of America,
Millwright District Council of Ontario, Applicant v. Electrical Power Systems
Construction Association; Ontario Hydro; and Canadian Union of Public Employ-
ees, Local 1000, Responding Parties

Constitutional Law - Construction Industry - Ironworkers' union and other unions disputing various work assignments made to Power Workers' union in connection with fabrication and installation of monorail systems at nuclear generating station of Ontario Hydro - Power Workers' union challenging Board's constitutional jurisdiction to determine jurisdictional dispute involving nuclear facility - Board determining that work in dispute falling within provincial jurisdiction and that Board having constitutional jurisdiction to adjudicate dispute - Board directing that work in dispute be assigned to Ironworkers' union and other unions

BEFORE: *Jules Bloch*, Vice-Chair, and Board Members *W. N. Fraser* and *J. Redshaw*.

APPEARANCES: *Stephen Wahl* for International Association of Bridge, Structural and Ornamental Ironworkers, International Association of Bridge, Structural and Ornamental Ironworkers, Local 736; *Douglas J. Wray* for Labourer's, Labourer's, Local 1059; Painters, Painters, Local 1891; Ontario Allied Construction Trades Council; Carpenters, Carpenters, Local 2222 and Carpenters, Millwright District Council of Ontario; *Patrick Moran* for Electrical Power Systems Construction Association; *Neil Finkelstein*, *Jeffrey W. Galway* and *George Vegh* for Ontario Hydro; *Chris Dassios*, *John Monger*, *William Campbell* and *Dan Heffernan* for Canadian Union of Public Employees, Local 1000.

DECISION OF THE BOARD; June 8, 1994

1. These are applications pursuant to section 93 of the *Labour Relations Act* ("the Act"). The Canadian Union of Public Employees, Local 1000 ("Power Workers") raised in these proceedings a challenge to the constitutional jurisdiction of the Board to hear and determine all issues with respect to the proper assignment of work jurisdiction pursuant to section 93 of the Act. The Attorneys General of Canada and Ontario were advised of the constitutional question, but neither wished to intervene in these proceedings.

2. On October 26, 1993, this panel made procedural rulings in Board File #3427-92-JD in respect of the Power Workers' request for reconsideration of the reasons for the panel's 1993 bottom line decision dated August 25, 1993, (reasons for which issued November 12, 1993 [reported at [1993] OLRB Rep. Nov. 1167]), regarding an assignment of work to the International Brotherhood of Electrical Workers, Local Union 1788 ("1788"). The Power Workers' Union submitted that the Board did not have the constitutional jurisdiction to decide the work assignment in respect of Hydro's nuclear business. By decision of this panel, dated November 8, 1993, the Board consolidated a number of jurisdictional dispute applications (including #3427-92-JD) as they raised similar constitutional arguments in respect of the Board's jurisdiction. This panel directed the Registrar to list for hearing, a preliminary matter raised by 1788 in Board File #3427-92-JD. Local 1788 requested that the Board refrain from hearing the constitutional issue in Board File #3427-92-JD given the stage of the proceedings. The Board heard the preliminary motion on January 27, 1994 and issued a bottom line decision dismissing the Power Workers' request for reconsideration. This decision deals with the Board's constitutional jurisdiction to hear the work assignment issue with respect to the Board files listed in paragraph 3 below.

3. The Board will refer to the applicants in Board File #2584-93-JD as ("Ironworkers"); in Board File #2658-93-JD as ("Labourer's"); in Board File #2659-93-JD as the ("Painters"); in Board File #2660-93-JD as ("OACTC"); Board File #2661-93-JD as ("Carpenters"); in Board File #2662-93-JD as ("Millwrights"). The applicants noted above, save and except the Ironworkers and 1788 (who were represented at the hearing by separate counsel), will be referred to as ("the Council"). The Responding Parties in all the above-noted Board Files will be referred to as ("EPSCA/Ontario Hydro") and the ("Power Workers"). The work in dispute with respect to all

the Board Files involved the installation and fabrication of a monorail at the Bruce Nuclear Generating Station.

4. The panel in its November 8, 1993 decision on procedural matters made the following directions:

7. We direct C.U.P.E. in all the above-noted jurisdictional disputes to file with the Board and all the other parties by November 19, 1993, (This direction does not change the time limits in respect of Board File No. 3427-92-JD):

- a. a detailed statement of all legal positions and submissions as they affect all the work in dispute;
- b. a detailed description of the orders or remedies requested;
- c. a statement of all material facts which have not already been placed before the Board during the consultation and on which the applicant relies in respect of orders and remedies requested.

8. Upon receipt of the filings from C.U.P.E., all the other responding parties are directed to file with each other, C.U.P.E. and the Board by November 29, 1993:

- a. a statement of agreement or disagreement with each position or submission;
- b. a statement as to its position with respect to the orders or remedies requested by the other parties;
- c. a statement outlining additional material facts on which the parties rely.

As well the Board, in that decision, consented after the agreement of all the parties, to assume without finding that the Board had jurisdiction to make a determination on the merits of the work assignment. The parties agreed to reserve their rights to argue the constitutional issue on a later date. At the end of the consultation, the Board issued an oral ruling regarding the monorail assignment at Boiler Alley #8.

5. In response to the directions of the *Board*, the parties filed twenty-three volumes of material facts, legal positions and submissions. In view of the volumes of material facts and the probability of numerous days of hearing, the parties attempted to agree on the facts in dispute. Although this did not prove successful, the parties agreed that all the material facts before us could, for the purpose of the hearing, be treated as evidence. It was agreed that the panel would first hear the arguments based on the material facts and only entertain *viva-voce* evidence if there were matters directly in dispute and the resolution of the factual disputes would be necessary for the final finding on constitutionality.

6. A majority of the panel (Vice-Chair Bloch dissenting) granted Local 1788 standing in this proceeding. The standing was limited to legal submissions. The Ontario Sheet Metal Workers' Conference was denied standing in this matter by a unanimous panel.

7. The argument, based on the materials facts submitted in respect of the constitutional issue, was heard in Toronto on May 3, 4 and 5, 1994. The parties made extensive submissions before the panel. The Board contacted the parties on May 9, 1994 and informed them that it would not require any *viva-voce* evidence. These submissions have been carefully reviewed by the Board. The citations of the cases referred to by counsel in argument are reproduced below. (*Northern Telecom Limited* (No. 1) [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1 (S.C.C.); *Northern Telecom Limited* (No. 2) [1983] 1 S.C.R. 732; 147 D.L.R. (3d) 1 (S.C.C.); *Ontario Hydro* [1993] 3 S.C.R. 327;

OLRB Rep. Oct. 1071; 107 D.L.R. (4th) 457 (S.C.C.); *Ontario Hydro*, [1994] OLRB Rep. Mar. 277; *Montcalm Construction Inc.* [1979] 1 S.C.R. 754, 93 D.L.R. (3d) 641 (S.C.C.); *T-D Bank*, [1992] OLRB Rep. Oct. 1123, App. for JR dis'd March 17, 1993 (Ont. Div. Ct.); Leave to appeal dis'd June 14, 1993 (Ont. C.A.); Leave to appeal dis'd Jan. 27, 1994 (S.C.C.); *Re Canada Labour Code* (1986) 72 N.R. 348 (Fed. C.A.), 34 D.L.R. (4th) 228; *Vipond Automatic Sprinkler* (1976) 67 D.L.R. (3d) 381 (Alta. S.C.); *Henuset Rentals Ltd.* (1979) 79 CLLC 14,194, 96 D.L.R. (3d) 651 (Sask. Q.B.) aff'd (1980) 119 D.L.R. (3d) 639 (Sask. C.A.); *W. Rourke Ltd.*, [1983] OLRB Rep. Oct. 1711; *Manitou Mechanical Ltd.* [1978] OLRB Rep. July 657; *The Letter Carriers' Union of Canada* [1975] 1 S.C.R. 178; *Reimer Express Lines Limited* (1987) 69 di 161; *Bernshine Mobile Maintenance Ltd.* (1985) 62 N.R. 209, [1986] 1 F.C. 422 (Fed. C.A.); *Highway Truck Service Ltd.* (1985) 62 N.R. 218 (Fed. C.A.); *City of Kelowna* (1974) 42 D.L.R. (3d) 754 (B.C.S.C.); *Field Aviation Co. Ltd.* (1974) 45 D.L.R. (3d) 751 (Alta. S.C.) aff'd (1975) 49 D.L.R. (3d) 234 (Alta. S.C.A.D.); *National Protective Service Company Limited*, [1987] OLRB Rep. Feb. 245; *Canadian Communications Structures Inc.*; [1992] OLRB Rep. July 777; *Master Insulators' Association of Ontario Inc.*, [1980] OLRB Rep. Oct. 1477; *National Elevator and Escalator Association*, [1991] OLRB Rep. Apr. 555; *Abitibi-Price Inc.*, [1986] OLRB Rep. Dec. 1613; *Briecan Construcution Limited*, [1989] OLRB Rep. May 417; *Windsor Airline Limousine Services Ltd.* (1980) 117 D.L.R. (3d) 400 (Ont. Div. Ct.); *Toronto Electric Com'rs v. Snider et al* [1925] 2 D.L.R. 5; *Cargill Grain Co. Ltd.* (1989) 63 D.L.R. (4th) 174 (Fed. C.A.), [1990] 1 F.C. 511 (Fed. C.A.); *Reference Re Validity of Industrial Relations and Disputes Investigation Act (Can.) and Applicability in Respect of Certain Employees of Eastern Canada Stevedoring Co. Ltd.* (1955) 3 D.L.R. 721 (S.C.C.), [1955] S.C.R. 529; *Re United Association of Journeymen & Apprentices of the Plumbing, Steamfitting & Pipefitting Industry of the United States and Canada, Local 682 and United Steelworkers of America, Local 1064 et al* (1992) 89 D.L.R. (4th) 694 (N.S.C.A.); *ATM Automatic Bank Teller* (1985) 22 D.L.R. (4th) 282 (BCCA); *Service D'Entretien Avant-Garde Inc.* (1985) 26 D.L.R. (4th) 331 (Que. S.C.); *Cannet Freight Cartage Ltd.* (1975) 60 D.L.R. (3d) 473 (FCA), [1976] 1 F.C. 174 (Fed. C.A.); *Ontario Hydro* (1989) 69 O.R. (2d) 268 (Ont. Div. Ct.) rev'd 1 O.R. (3d) 737 (Ont. C.A.); *Ontario Hydro*, [1991] OLRB Rep. Apr. 578; *Ontario Hydro* (1991) 1 O.R. (3d) 737 (Ont. C.A.), aff'd (1993) 107 D.L.R. (4th) 457 (S.C.C.); *Bachmeier Diamond and Percussion Drilling Co. Ltd.* (1962) 35 D.L.R. (2d) 241 (Sask. C.A.); *Henuset Rentals Ltd.* (1980) 119 D.L.R. (3d) 639 (Sask. C.A.), leave to appeal refused (1981) 37 N.R. 358 (S.C.C.); *Re Attorney-General of Nova Scotia and Maritime Engineering Ltd. et al* (1980) 105 D.L.R. (3d) 158 (N.S.C.A.); *Toronto Dominion Bank*, [1993] OLRB Rep. June 578, leave to appeal dis'd June 14, 1993 (Ont. C.A.), leave to appeal dis'd Jan. 27, 1994 (S.C.C.); *Reclamation Management Canada Ltd. et al*, [1993] OLRB Rep. June 549; *Vibration Assessment Limited*, [1989] OLRB Rep. Feb. 223; *The Anderson Company et al*, [1979] OLRB Rep. Nov. 1033; *Northern Communications Services Limited*, [1991] OLRB Rep. Sept. 1089; *Regina v. Ontario Labour Relations Board, Ex parte Nick Mansey Hotels Ltd.* (1970) 13 D.L.R. (3d) 289 (Ont. C.A.); *Cedarvale Tree Services Ltd.* (1971), 22 D.L.R. (3d) 40 (Ont. C.A.); *Crosbie Offshore Services et al.* [1981], 2 Can LRBR 38; *K-Mart Canada Limited*, [1981] OLRB Rep. Feb. 185; *Re Jordan et al, and York University Faculty Association et al* (1977) 84 D.L.R. (3d) 557 (Ont. Div. Ct.); *Ontario Hydro et al*, [1993] OLRB Rep. May 442; *Re Communal Property Act* [1949] 1 W.W.R. 900 (Alta. D.C.); *R. v. Thomas* (1990), 108 N.R. 147 (S.C.C.), [1990] 1 S.C.R. 713; *Cuddy Chicks Ltd.* (1991), 81 D.L.R. (4th) 121 (S.C.C.); *The Society of Ontario Hydro Professional and Administrative Employees v. Ontario Hydro* [1988] OLRB Rep. Feb. 187; *R. v. Nova Scotia Labour Relations Board* (1968), 68 D.L.R. (2d) 613 (N.S.T.D.); *National Protective Service Company Limited* [1987] OLRB Rep. Feb. 245; *Wardair Canada (1975) Ltd. et al* (1979) 97 D.L.R. (3d) 38 (Fed. C.A.); *Canadian Pacific Railway Company v. Attorney General for British Columbia et al.*, [1950] A.C. 122; *R. v. Board of Transport Commissioners* [1968] S.C.R. 118; *Ottawa Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al* (1983) 44 O.R. (2d) 560 (C.A.); *The Public Service Board v. Dionne* [1978] 2 S.C.R. 191; *Field Aviation Co. Ltd.* (1974) 49 D.L.R. (3d) 234 (Alta. S.C.A.D.); *Commission*

du Salaire Minimum v. Bell Telephone Co. of Canada (1966) 59 D.L.R. (2d) 145 (S.C.C.); *Pronto Uranium Mines Limited v. The Ontario Labour Relations Board et al* [1956] O.R. 862 (H.C.); *M & B Enterprises Ltd.* [1975] 1 S.C.R. 178; *Charterways Transportation Limited*, [1993] OLRB Rep. Nov. 1125; *Vis-U-Ray Limited*, [1971] OLRB Rep. Nov. 703; *Canada Labour Relations Board et al v. Paul L'Anglais Inc. et al* (1983) 146 D.L.R. (3d) 202 (S.C.C.); *Re Attorney-General of British Columbia and Attorney-General of Canada* (1991) 84 D.L.R. (4th) 385 (B.C.C.A.); *I.B.E.W. v. Alberta Government Telephones* [1989] 5 W.W.R. 455 (S.C.C.); *Alberta Government Telephones v. Canadian Radio-Television and Telecommunications Commission and CNCP Telecommunications* [1989] 2 S.C.R. Aug. 225; *Central Western* (1988) 84 N.R. 321 (Fed. C.A.), rev'd (1990) 76 D.L.R. (4th) 1 (S.C.C.); *Re Ontario Public Service Employees Union and the Crown in Right of Ontario et al* (1994) 16 O.R. (3d) 735 (Ont. Div. Ct.); and *Frias v. Minister of Manpower and Immigration* 7 N.R. 602 (S.C.C.).

8. Ontario Hydro is an electrical utility. As an electrical utility Ontario Hydro has acted as a general contractor in the construction industry. As a consequence of the different work characteristics performed by Ontario Hydro (in juxtaposition to work characteristics performed by contractors in the Industrial Commercial and Institutional sector of construction industry) the Legislature promulgated a sector within the construction industry sections of the Act known as the Electrical Power Systems Sector (see: *S.R. Ellis "Electrical Power Systems Sector Inquiry Report"* January 31, 1978). Ontario Hydro can best be described as both the largest electrical utility and the largest general contractor in the province.

9. The work in dispute is described as follows:

Ontario Hydro has commenced the new installation of monorail systems at the Bruce "B" Nuclear Generating Station, organized into the following packages:

(a) Boiler Alley east and west sides Elevation 696 *Contract No. NK29-9122-A*

West Side Installation fabricate and install 111 lineal feet of S8A18.4 monorail beam at elevation of 707'-4". Include a minimum of 13 connection points across the 24" thick concrete walls of the steam drum enclosure. Allow for two locations of the monorail to be curved, one to re-route around existing piping and second to bring the monorail out to the centre of the south access stairs. Allow for installation of one new beam at the north end of the Boiler Alley on grid line 6.8. Elevation to underside of beam to match existing. Connection to existing column at east end will require field welding while the west end will sit on top of the steam drum enclosure of a bearing plate. Allow for two S8A18.4 beam used to span east/west across Boiler Alley at approximately 705'-0 elevation.

East Side Installation: fabricate and install 106 lineal feet of S8A18.4 monorail beam at elevation of 708'.0 include a minimum of 14 connection points to the existing steel at elevation 712'.9 and 14 lateral connections from the top of the monorail beam across to the 24" thick concrete walls of the steam drum enclosure. Allow for two S8A18.4 beams to span east/west across Boiler Alley at approximately 705'-0 elevation.

Material: all structural steel to be CSA G40.21-44W, fabricated and erected to CAN-CSA - S16.1-M89 Connections: bolts - minimum 5/8 diameter A325,

Field welding - shall be done in accordance to Ontario Hydro specification S-413SM-80 and to CSA W59, latest editions.

Anchoring to concrete - use seismically qualified cinch anchors, minimum 5/8 diameter by 6" long.

10. For ease of reference we will describe the work in dispute as the fabrication and installation of a monorail.

11. It is the usual practice of Ontario Hydro to let out work in discrete work packages. The work in question was assigned in that matter. These packages are usually temporary in nature and can be assigned to the Power Workers, the various unionized trades (either as direct Ontario Hydro hires or as part of a sub-contractor's work force) or to non-union sub-contractors. The decision as to which union will be assigned the work is made pursuant to the various collective agreements between the parties and Ontario Hydro policy. Ontario Hydro's almost exclusive practice, prior to the fabrication and installation of this monorail, was to award this type of work to the Council and the Ironworkers. The nuclear mechanical maintainers do not normally perform this type of work.

12. The work in dispute involves the fabrication and installation of a monorail system at the Bruce Nuclear Generating Station ("BNGS") by members of the Power Workers. This work does not involve the operation of the monorail at the BNGS. BNGS is a CANDU nuclear reactor site located near Kincardine, Ontario. It is operated by Ontario Hydro in accordance with licenses issued by the Atomic Energy Control Board ("AECB"). The AECB is the federal Board responsible for, among other things, regulating the development, control, supervision and licensing the production, application and use of atomic energy, pursuant to the *Atomic Energy Control Act*, R.S.C. 1985, c.A-16 ("the AECA"). The *Atomic Energy Control Regulations* C.R.C., 1978, c. 365 ("the AECR") define a nuclear facility in the following manner:

means a nuclear reactor, a sub-critical nuclear reactor, a particle accelerator, a plant for the separation, processing, re-processing or fabrication of fissionable substances, a plant for the production of deuterium or deuterium compounds, a facility for the disposal of prescribed substances and includes all land, buildings and equipment that are connected or associated with such reactor, accelerator, plant or facility: (établissement nucléaire)

13. The BNGS includes a number of facilities governed pursuant to licenses issued by the AECB. The site operates as a highly complex and integrated unit of buildings and systems, which combine to safely produce electricity from nuclear fission.

14. The monorail system is a mechanism for moving heavy materials by attaching them to mobile hooks which run along a suspended I-beam. Prior to the installation of the monorail system, these materials were handled physically. The monorail system, when completed, will be located in "boiler alley" which is in the reactor buildings at BNGS reactor "B". These monorails are placed over the service alleys located to the east and west of each reactor. The installation of the monorails is intended to reduce maintenance time and increase the safety of doing work in the boiler alleys. Ontario Hydro did not need any regulatory approval, from the AECB, for the installation or fabrication of the monorail. As well, Ontario Hydro did not require an Engineering Change Notice ("ECN") for the installation of the monorail. The monorails were fabricated by nuclear mechanical maintainers (members of the Power Workers) at the CMF. The monorails were installed by nuclear mechanical maintainers.

15. The parties filed documentary evidence regarding the safe operation of the BNGS. As an operational nuclear facility, the BNGS contains many different types of radiological hazards. Ontario Hydro, in accordance with the AECB licenses, has established comprehensive and compulsory radiation protection procedures at the BNGS. One of the key elements of these procedures is the policy pursuant to which the BNGS is divided into zones, based on the presence of radioactive systems and the probability that radioactive work will be carried out in various areas.

16. The boiler alleys which are the subject of this dispute are located within Zone Three

(the high risk zone), while the Central Maintenance Facility ("CMF") is located in Zone Two. The boilers contain heavy water, which is a "prescribed substance" under the *AECA* as a result of the possible radiological hazard it poses. Some of the heavy water is converted to tritium as it passes through the boiler system. Tritium also is a "prescribed substance", and possesses a greater hazard than the heavy water. The radiologically active components found within the heavy water portions of the boiler system make exposure to the boilers potentially very dangerous.

17. As a result of the inherent risk of radiological contamination and in accordance with the licenses, an elaborate set of Radiation Protection Procedures ("RPP") have been developed by Ontario Hydro to ensure that the risks to anyone associated with the nuclear site are minimized. These procedures apply to the entire BNGS, regardless of the zone. The rigorousness of the procedures increases as the zone number increases. All workers are rated for their safety competence, and there is a requirement that appropriately qualified safety personnel be available to address any radiological concerns during all facets of work on or at the site.

18. The RPP book contains amongst other things, information pertaining to permissible radiation exposure levels applicable to Atomic Energy Workers ("AEW"); record keeping requirements relating to the exposure experienced by each AEW, guidelines pertaining to the movement of staff and substances between zones; and directives relating to work planning and hazard and exposure management.

19. While fabricating and installing the boiler alley monorails, the employees of Ontario Hydro, (be they members of the construction trades, members of the Power Workers, or non-union employees) would be working under the conditions set out in the RPP for working in Zone Three. All workers working on the site must wear badges prescribed by the AECB signifying a particular level of safety and emergency training. The level of training determines the colour of the badge. The colour of the badge dictates which zones an employee is entitled to work in, and the level of supervision the employee requires or can provide in the various zones. This particular job required "greenmaning". That is to say, under the RPP's a certain number of workers had to have "greenmaning" credentials so that the monorail could be fabricated and installed safely within the nuclear station environment. The "greenmaning" credential is held by members of the various trades as well as members of the Power Workers.

20. Licenses pertaining to the BNGS require that the station be operated in accordance with AECB approved policies pertaining to staff complement and organization. These policies are in respect of minimum staffing allocation, and are directed towards the safe and efficient running of a nuclear facility. Among other classifications, the policies require that a minimum of two mechanical maintainers staff the facilities at all times. Mechanical maintainers as a group spend the majority of their work day performing tasks that involve nuclear specific knowledge. The staffing policy is silent with respect to the minimum number of "construction trades" persons required to staff the nuclear facility.

21. In the summer of 1993, Ontario Hydro undertook a major restructuring of the business units. ENCON, which had previously been the Design and Construction Division, was integrated into the various business units. This reorganization created localized construction departments within each business unit. In the Nuclear Business group these departments were given the title of the "Projects and Modifications Department".

Decision on Constitutional Issue

22. Prior to the decision of the Supreme Court of Canada in *Ontario Hydro v. Ontario (Labour Relations Board)* ("Ontario Hydro"), all labour relations matters relating to Ontario Hydro

were governed under the auspices of Ontario labour relations law. No distinction was made between the nuclear, thermal and hydro-electric components of an integrated power delivery system. As a consequence of the *Ontario Hydro* decision, adjudicators must now demarcate the line where the non-nuclear business of Ontario Hydro stops and the nuclear business starts.

23. Labour relations are primarily a matter of provincial jurisdiction. However through its declaratory power pursuant to section 92 (10) of the *Constitution Act, 1867* ("the B.N.A.") or through its Peace, Order, and Good Government ("P.O.G.G") power pursuant to the preamble of section 91 of the B.N.A. the Federal Parliament may declare that a local Work or Undertaking, like the nuclear business of Ontario Hydro, be regulated by the Federal Parliament. (The Board when referring to "Work" or "Undertaking" is referring to these works in a constitutional sense). The delineation of these powers involves a careful balance between the federal sphere and the provincial sphere.

24. Parliament's jurisdiction over a declared Work or Undertaking is limited so as to respect the power of the Provinces, but consistent with the appropriate declared federal interest. To decide if Parliament has ousted provincial jurisdiction from a given Work or Undertaking, with respect to labour relations, one must determine the exact nature of the federal Work or Undertaking, and whether the work is integral to the federal Work.

25. As a general guideline courts have said that if the work is within a federal Work or Undertaking, or an integral part of one, labour relations, because it is considered essential to the management of the federal Work or Undertaking, will be within the federal jurisdiction. However, where the work is not part of, or integral to, the federal Work or Undertaking then the employees performing that operation are most likely governed by labour relations in the provincial sphere. If, for example, one was contracted to build a runway at an airport for a federal airport authority, one could expect that the employees engaged in building the runway would be governed by provincial labour laws. However, if one was contracted to remove snow from the same runway, one could expect that the employees engaged in removing the snow would be governed by federal labour legislation. In the same regard, if one was contracted to mine uranium one could expect that the employees engaged in the mining operation would be governed by federal labour relations. However if one was contracted to install a conveyor system in an already existing uranium mine one could expect that the employees engaged in the installation of the conveyor system would be governed by provincial labour laws. (see: *Northern Telecom v. Communications Workers (No. 1)* ; *City of Kelowna*; *Montcalm Construction Inc.*; *Manitou Mechanical Ltd.*; and *Pronto Uranium Mines Ltd.*).

26. This set of constitutional facts presents an interesting issue with respect to a business that has a corporate structure which includes both nuclear and non-nuclear businesses. The first step in attempting to draw the line in respect of where the non-nuclear business stops and the nuclear business begins is to understand the dimensions of the federal Undertaking. The Supreme Court of Canada in the *Ontario Hydro* case had occasion, in what has been referred to as a plurality decision, to decide the dimensions of the federal Undertaking in respect of Ontario Hydro's nuclear business. Lamer C. J. agreed with Iacobucci J.'s characterization of the "federal" portion of the Undertaking. Lamer C. J. frames the federal Undertaking in the following way:

... Rather, I think that stating Parliament's interest in the "control of supervision of the ... application and use of atomic energy" directly implicates regulation of the activities involved in that application and use, which in turn involves the regulation of those employed in producing nuclear power. In fact, Iacobucci J. agrees at p. 416 that "the uniquely federal aspect of Ontario Hydro's nuclear electrical generating stations is the fact of nuclear *production*, with all its attendant safety, health and security concerns". ...

As the discussion below of the regulations made under the AECA makes clear, the Atomic Energy Control Board is given broad regulation-making power, through which the production of nuclear energy is primarily controlled and supervised. Section 9(b) AECA, for example, allows the Board to make regulations “for developing, controlling, supervising and licensing the production, application and use of atomic energy”. It is through this regulation-making power that the Board has made clear the federal government’s interest in labour relations matters affecting nuclear energy, and to which I shall now turn.

(see: *Ontario Hydro*, S.C.R. at p. 341-2)

Iacobucci J., speaking for Sopinka and Cory concurring, characterized the federal Undertaking in the following way:

There is nothing in this statement, nor in the rest of the Act, that explicitly or implicitly reveals a federal interest in regulating labour relations. It is apparent from the *Atomic Energy Control Act* that the uniquely federal aspect of Ontario Hydro’s nuclear electrical generating stations is the fact of nuclear production, with all its attendant safety, health and security concerns.

(see: *Ontario Hydro*, S.C.R. at p. 416)

27. This analysis would limit the jurisdiction of the federal legislature to matters that effect the *production* of nuclear energy, with all its attendant safety, health and security concerns. Put simply, when focusing on the constitutional facts the panel must decide whether there are constitutional facts sufficient to lead the panel to the conclusion that the fabrication and installation of this monorail, at the Ontario Hydro nuclear site, is integral to the federal Undertaking.

28. The Power Workers argued that the nuclear mechanical maintainers are almost always responsible for work assignments which relate to work that is integral to the Undertaking. Consequently, they assert, when the nuclear mechanical maintainers are performing tasks which are not “vital” or “integral” to the federal Undertaking, those tasks, even though they relate to such a small portion of the overall work of federally regulated employees, must be found to be work that is integral to the federal Undertaking. Similarly the Power Workers argued that the decision about “federalness” can be decided on the basis of which “part” of Ontario Hydro assigned the work. In other words, if a department of the nuclear business made a decision about the assignment of work then the work would be integral to the federal Undertaking; however, if a department of the non-nuclear business made the assignment then the work would be found not to be “vital” or “integral” to the federal Undertaking.

29. The Power Workers relied on the reasons of the Supreme Court of Canada in *Northern Telecom (No. 1)* which outlined a set of questions that helped to focus the inquiry in respect of whether the installers of telephone equipment employed by the manufacturer were part of the federal telephone and telecommunications Undertaking.

30. In the case before us, the nuclear business of Ontario Hydro is part and parcel of its overall corporate structure. The activities of Ontario Hydro are primarily provincial in nature. It is only the narrow sphere of the nuclear operations that have been held to fall within federal jurisdiction. The fabrication and installation of a monorail as such does not involve the production of nuclear energy or the operation of the nuclear facility. Accordingly, the facts before us are closer to the situation considered by the Courts in *T.D. Bank*, to which we will return below. Our fact situation is different then *Northern Telecom (No. 1)* and *(No. 2)*.

31. This is a case where one must look at the work itself and see if the work is vital to the federal Undertaking regardless of who did it or what department of Ontario Hydro was responsible for it.

32. The federal Parliament has promulgated legislation, regulations and policies to deal with nuclear energy concerns. The AECB is an administrative tribunal which has jurisdiction to review practices, policies and procedures relating to the production of nuclear energy. It is clear that any labour relations matter dealing with the production of nuclear energy and its attendant health and safety concerns is within the federal sphere of legislative competence. That being the case, the panel must decide if the umbrella of federal legislation and subordinate regulations, policies, procedures and licenses, that apply in the environment, operate to instill a "federalness" upon the fabrication and installation of the monorail.

33. The Power Workers assert that the most important effect of the licenses, regulations, practices and procedures upon the federal Undertaking is to ensure a safe workplace in respect of radiological hazards. An example of this is the zoning practices which require a certain type of ARW to be involved with the installation of the monorail. These ARW's must wear badges which inform people about the level of safety and emergency training the ARW has received. In this case there had to be a certain number of workers with the highest level of training at the installation of the monorail. The licenses require that the stations be run in accordance with approved AECB policies relating to staff complement. These policies, submit the Power Workers, clearly relate to the safe and efficient operation of the nuclear facility. The licenses also require Ontario Hydro to keep the AECB informed of changes to the physical site. Certain changes will need prior approval by the AECB.

34. There is a high degree of involvement of the AECB in terms of regulating the construction and alteration of the physical structure of a nuclear facility. However, in respect of the fabrication and installation of the monorail, Ontario Hydro did not request AECB approval for this work. As well, although safety concerns touch upon all aspects of the facility, this by itself does not affect the labour relations jurisdiction. The dichotomy between what part of the construction process is subject to federal labour relations and what part is subject to provincial labour relations was reviewed by Beetz J. in the *Construction Montcalm* case at S.C.R. p. 770-71:

The construction of an airport is not in every respect an integral part of aeronautics. Much depends on what is meant by the word "construction". To decide whether to build an airport and where to build it involves aspects of airport construction which undoubtedly constitute matters of exclusive federal concern: the *Johannesson* case. This is why decisions of this type are not subject to municipal regulation or permission: the *Johannesson* case; *City of Toronto v. Bell Telephone Co.*; the result in *Ottawa v. Shore and Horwitz Construction Co.* can also be justified on this ground. Similarly, the design of a future airport, its dimensions, the materials to be incorporated into the various buildings, runways and structures, and other similar specifications are, from a legislative point of view and apart from contract, matters of exclusive federal concern. The reason is that decisions made on these subjects will be permanently reflected in the structure of the finished product and are such as to have a direct effect upon its operational qualities and, therefore, upon its suitability for the purposes of aeronautics. But the mode or manner of carrying out the same decisions in the act of constructing an airport stand on a different footing. Thus, the requirement that workers wear a protective helmet on all construction sites including the construction site of a new airport has everything to do with construction and with provincial safety regulations and nothing to do with aeronautics: see *R. v. Beaver Foundations Ltd.* and *R. v. Concrete Column Clamps (1961) Ltd.* See also *Re United Association of Journeymen, etc. Local 496 and Vipond Automatic Sprinkler Co. Ltd.*, where Cavanagh J. of the Alberta Supreme Court held that "the fact of construction of a building called an air terminal does not ... show that the construction is connected with aeronautics" and that, while an aerodrome is a federal work, employees constructing such a building are subject to provincial labour relations legislation. In my opinion what wages shall be paid by an independent contractor like *Montcalm* to his employees engaged in the construction of runways is a matter so far removed from aerial navigation or from the operation of an airport that it cannot be said that the power to regulate this matter forms an integral part of primary federal competence over aeronautics or is related to the operation of a federal work, undertaking, service or business.

In our view it is clear that although the planning process, safety procedures, emergency procedures and supervision are integral to the federal Undertaking, this does not necessarily mean that fabrication or installation is.

35. In *T.D. Bank* the Board found that direct hire construction employees of a bank were not subject to federal labour relations laws because the construction of a bank was not found to be an integral part of the banking function. In *Henuset Rentals Ltd.* the Saskatchewan Court of Queen's Bench found that construction of an interprovincial pipeline was governed by provincial legislation while its repair and maintenance, being operational features, were within federal jurisdiction.

36. Both *T.D. Bank* and *Henuset Rentals Ltd.* involve construction from the ground up. The case at hand involves an addition to an already existing structure. The Board in *Manitou Mechanical* held that it had jurisdiction to hear a certification matter dealing with employees of a contractor performing work in respect of the installation of a conveyor system at an operating uranium mine. The Board held at page 661 of its decision that:

The application of the functional test in this case leads to the conclusion that the work in question is neither an integral part of nor is it necessarily incidental to the operation of the Denison Mine. Although the conveyor system, when installed, will be an integral part of the Denison mining operation, the installation itself is not "an integral part of or necessarily incidental to the production, refining or treatment of uranium ore." In the result, the Board is satisfied that it has the jurisdiction to proceed in this matter.

We would adopt the analysis from *T.D. Bank*, *Henuset Rentals Ltd.* and *Manitou Mechanical*. It is clear from those decisions that the issue is not whether the work is, "from the ground up" construction or additions, or even replacements. The issue for the particular facts is how integral or vital the work is to the federal Undertaking?

37. In our opinion planning, operation and safety issues regarding the monorail are within the federal sphere of jurisdiction. However the fabrication and installation of the monorail is not.

Work Assignment Decision

38. The panel during its deliberations focused on two factors, the competing collective agreements and the practice of Ontario Hydro and EPSCA with respect to the work in dispute.

39. In respect of the collective agreement between the Power Workers and Ontario Hydro, this panel adopts the decision of the Board in *Ontario Hydro*, [1993] OLRB Rep. Nov. 1167 where at paragraph 12 the panel held that:

Generally speaking, within the context of a jurisdictional dispute, the panel must satisfy itself that both collective agreements are able to be interpreted such that the work in dispute is covered within each trade unions jurisdictional work claim. In respect of Local 1788, it is clear and unambiguous that the work in dispute is covered by their collective agreement with Hydro. In fact, none of the parties argued otherwise. In respect of CUPE, although it is not clear that the work in dispute falls within the ambit of their collective agreement with Hydro, there is enough ambiguity in respect of how the agreement has been applied such that the panel declines to decide this case on the basis that there is no jurisdictional claim in the CUPE collective agreement in respect of the work in dispute.

40. Both the Power Workers and Ontario Hydro/EPSCA challenged the extent of the bargaining rights between the Council and EPSCA and the Ironworkers and EPSCA. The Power Workers submitted that the Council's and the Ironworker's bargaining rights were limited to situations where ENCON or ENCON's successor (a construction branch) was responsible for the work

assignment. Since this is a case where Operations was responsible for the work assignment, asserted Power Worker's counsel, neither the Ironworkers' nor the Councils' collective agreements covered this work assignment and therefore the work could not be performed pursuant to the collective agreement. Further, the Power Workers argued that this was not a major modification and consequently the work was not covered by the collective agreement. Ontario Hydro/EPSCA argued that both the Councils' and the Ironworkers' collective agreements limited their application to situations involving major modifications with field labour of more than \$100,000.00. They submitted that the original bid, by Operations, for field labour, was less than \$100,000.00, and consequently neither the Ironworkers or the Council were entitled to the work.

41. We find that the collective agreements of the Council and the Ironworkers are not limited to a construction division of Ontario Hydro. For the purposes of this jurisdictional dispute it is unnecessary to delineate the exact parameters of the Ironworker's or the Council's bargaining rights. Further, we find that this work is a major modification of the facility. The final cost of the work included in excess of \$100,000.00 of field labour. Although the original work estimate was for a monorail known as "boiler alley monorail #8", the material before us indicates and we find that Ontario Hydro has also committed itself to the installation and fabrication of "boiler alley" monorail #5, #6, #7 and ancillary projects.

42. The practice evidence placed before us in the briefs uniformly shows that the fabrication and installation of monorails has been performed by the Council and the Ironworkers in all business units of Ontario Hydro across the province. The uniformity of the practices indicates that Ontario Hydro has historically treated this work as a major modification. Consistent with Ontario Hydro's practice and the nature of the work in dispute here, the appropriate assignment was to have awarded this work to the Council and the Ironworkers.

43. Ontario Hydro is a province-wide utility. The bargaining rights held by the various unions within the Ontario Hydro system are province-wide. The Board, where it can, must attempt to minimize the possibility of further jurisdictional disputes in respect of the same type of work. In *Comstock Canada* [1993] OLRB Rep. Aug. 740 the Board at paragraph 9 said the following:

The wording of section 93(2) gives the Board authority to make its decisions binding on parties for other jobs not then in existence, or jobs in other geographic areas. The Legislature has given the Board specific authority to make decisions affecting future jobs, where no work at all has yet been performed. To fulfill this statutory mandate, to fully determine work assignment disputes, the Board must take a realistic view of the work in dispute. The jurisdictional disputes provisions are unlike other parts or sections of the *Labour Relations Act*. For the Board to be able to determine work assignment disputes between trades in a practical fashion, it may in given situations have to look at the overall context. In circumstances where a dispute clearly exists over particular work, where parties have been put on notice of the nature of the competing claims and provided full opportunity to respond, it is more consistent with the Board's mandate to resolve jurisdictional disputes to deal with the real work in dispute.

44. The Board directs Ontario Hydro to assign to the applicants the work in dispute namely;

all work in connection with the fabrication and installation of monorail systems, including supplementary support steel or other supports;

all work in connection with the erection and dismantling of scaffolds used in the fabrication and installation of monorail systems;

all painting work in connection with the fabrication and installation of monorail systems;

all clean-up work associated with such construction;

at the Bruce Nuclear Generating Station, Tiverton, Ontario; and in the electrical power system in the Province of Ontario generally.

to be assigned as follows:

- (a) crews of Ironworkers and crews of Millwrights shall perform all work in connection with the fabrication and installation of the Monorail systems, including support steel or other supports, in accordance with the respective division of work set out in various International Agreements between the two trades.
- (b) all work in connection with the erection and dismantling of scaffolds used in the fabrication and installation of monorail systems, with members of the Carpenters Union erecting and dismantling scaffolding and members of the Labourers' Union tending carpenters and handling scaffolding material and from the place of erection.
- (c) all work in connection with painting to be performed by members of the Painters' Union.
- (d) all work in connection with clean-up for all trades working on the monorail systems and associated scaffolding to be performed by members of the Labourers' Union.

in the electrical power sector throughout the Province of Ontario.

45. A separate panel of this Board, which included the Alternate Chair, has, in a number of decisions dealing with a growing number of applications pursuant to the jurisdictional dispute sections of the *Act*, said the following:

This dispute is unique in a variety of ways, including: the number of identity of the parties involved; the provincial scope of Hydro's operations; the nature of the issues (some of which may involve "constitutional questions"); the sheer magnitude of the potential litigation; and the potential cost to the parties *and the public*.

It is not obvious to the Board that this dispute can, or should be, resolved by piecemeal litigation of individual applications, or that the normal hearing/consultation format is the most appropriate one. In the circumstances, if there is to be litigation, it is not obvious that the timetable should be governed by the vagaries of filing. Nor is it apparent that the existing *Rules* are well suited to handle a dispute of these dimensions. The Board is also aware that if the litigation commences and continues, the Board's own Rules and Procedures, will probably become a "tactical" weapon to be used by one party or the other to advance its interests.

In the circumstances, the Board has decided that it should review the general situation with a view to constructing a more economical, expeditious, and perhaps global resolution of the dispute. In the meantime (and pursuant to Rule 22) the Board will relieve responding parties from strict compliance with the Rules respecting Replies, and will neither process nor schedule for hearing/consultation new applications filed after this date. Similarly, the Board will adjourn related proceedings (for example applications under section 126 of the *Act*) which appear to be part or an aspect of the same general dispute.

Unless the parties are able to compose their differences, it may well be necessary to litigate some number of these applications. But until the Board has had an opportunity to review the situation and consider the best disposition of its own hearing resources, there will be a brief "moratorium".

46. It is not clear to this panel of the Board why the parties continue to litigate these matters in a piecemeal fashion. It is our view that these matters need a more comprehensive solution which would be best fashioned by the parties themselves. We would encourage the parties to this dispute to work towards such a solution in a timely manner.

3758-93-U Power Workers Union, CUPE Local 1000, Applicant v. Ontario Hydro, Responding Party

Adjustment Plan - Duty to Bargain in Good Faith - Practice and Procedure - Unfair Labour Practice - Union alleging that employer breaching duty to bargain in good faith and make every reasonable effort to negotiate adjustment plan - Subsequent to hearing of complaint, and while decision pending, Board informed by employer that parties had reached collective agreement including terms on certain adjustment issues and that application rendered moot - Union disputing employer's position - Board dismissing application on grounds on mootness, and on grounds that it would serve no labour relations purpose to inquire further into application because no remedial relief would be ordered

BEFORE: *S. Liang*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald*.

APPEARANCES: *Richard P. Stephenson* and *Geoff Holland* for the applicant; *Douglas K. Gray* and *Nicole Mailloux* and *T. Goldie* for the responding party.

DECISION OF THE BOARD; June 29, 1994

1. This is an application made pursuant to the provisions of section 91 of the *Labour Relations Act*, in which the applicant alleges a violation of section 41.1, which provides:

41.1- (1) This section applies in each of the following circumstances:

1. If the employer is required to give notice of termination in accordance with subsection 57(2) of the *Employment Standards Act* (termination of fifty or more employees) to employees who are represented by a bargaining agent.
2. If any employees are to have their employment terminated because of the permanent discontinuance of all or part of the business in respect of which a trade union holds bargaining rights.
3. In such other circumstances as the Lieutenant Governor in Council may prescribe.

(2) The employer shall notify the trade union that a circumstance described in subsection (1) exists not later than the first date on which the employer is required to give any affected employee in the bargaining unit a notice of termination under section 57 of the *Employment Standards Act*.

(3) Upon the request of the trade union, the employer and the trade union shall bargain in good faith and make every reasonable effort to make an adjustment plan.

(4) The employer and the trade union shall meet for the purpose of bargaining within seven days after the trade union makes the request.

(5) An adjustment plan may include provisions respecting any of the following:

1. Consideration of alternatives to terminating employees' employment.
2. Human resource planning and employee counselling and retraining.
3. Notice of termination.
4. Severance pay and termination pay.

5. Entitlement to pension and other benefits including early retirement benefits.
6. A bipartite process for overseeing the implementation of the adjustment plan.
7. Such other matters as the parties may agree upon.

(6) An adjustment plan is enforceable as if it were part of the collective agreement, if any, between the employer and the trade union.

(7) If there is no collective agreement in effect, the employer or the trade union may request that the Minister refer to a single arbitrator under subsection 46(1) a difference related to the interpretation, application or administration of an adjustment plan.

2. For ease of reference, the parties will be referred to as “the union” or “the PWU” and “the employer” or “Hydro”. At the time this matter came before this panel, on March 8, 1994, the parties were engaged in negotiating a renewal to a collective agreement which expired on March 31, 1994. At the outset of the case, the employer objected to the labour relations wisdom of inquiring into this complaint, when the parties were already engaged in collective bargaining, and entering into conciliation. Among other things, it was submitted that to the extent that the mischief addressed by section 41.1 is the lack of a mechanism by which parties can bargain adjustment plan issues during the currency of a collective agreement, this mischief is lacking where the parties are already engaged in collective bargaining and have the opportunity to negotiate everything which would be the subject of adjustment plan bargaining.

3. It was not disputed that at the time this objection was made, the parties had not placed adjustment plan issues on the bargaining agenda, and neither party indicated to the Board that it was intending to negotiate or agree to negotiate adjustment plan issues during their collective bargaining negotiations.

4. The Board ruled that the circumstances before it did not warrant the exercise of its discretion to decline to inquire into the complaint on its merits, and proceeded to hear the evidence and representations of the parties on all issues. The complaint, in a nutshell, relates to the employer’s refusal to negotiate an adjustment plan pursuant to section 41.1. The applicant asserted that certain impending layoffs were the result of the “permanent discontinuance of...part of the business” of this employer. The union focused on five distinct job classes or operations whose staff reductions it alleged arose out of the permanent discontinuance of an aspect of this employer’s business. In response, Hydro maintained that with respect to some of these, in fact, there will be no involuntary terminations. With respect to others, there is no “part of a business” which has been discontinued, and in any event, the changes are not permanent. Essentially, it took the position that to the extent the obligation to negotiate an adjustment plan *pursuant to section 41.1* only arises upon the happening of certain specified events, these events have simply not occurred.

5. After the hearing in this matter, and while the decision of this panel was pending, the Board was informed by the employer that the parties had reached a collective agreement which in its view renders the current application moot. In the alternative, it was submitted that the agreement reached between the parties should cause the Board to exercise its discretion to decline to grant any relief in the application. As there was disagreement on these issues, the Board convened a hearing to receive the parties’ submissions.

6. Since we have decided that there is merit to the employer’s submissions, this decision

does not determine whether, prior to the hearing before us, the employer violated section 41.1 in refusing to negotiate adjustment plan issues with the union. The following are our reasons for our determination that the Board should decline to inquire further into this matter.

The Evidence

7. For the purposes of this decision, therefore, we will outline only the general background of the events which form the basis of this complaint, and the events which form the basis of the employer's "mootness" arguments.

8. On March 9, 1993, the Chairman of Ontario Hydro announced a major cost reduction and restructuring program. It was announced that as a result of this program, the Hydro work force would be reduced by 6,000 employees, out of a total of about 29,000. Of the 6,000 target, approximately 1500 employees had already left the corporation under earlier voluntary separation incentive programs. The announcement also indicated that Hydro expected that the reduction in the work force would be effected mainly through a range of options for voluntary departure, although considerable redeployment and some surplusings would also likely be necessary.

9. Two programs were offered to employees over the summer of 1993, the Special Retirement Program ("SRP") and the Voluntary Separation Program ("VSP") (references hereinafter to "voluntary separation" are intended to include both of these programs). The deadlines for accepting these programs were August 31 and September 30, respectively. Employees choosing to take these programs left the corporation by November 1. In all, approximately 4500 employees have left Hydro under voluntary separation.

10. Once it was clear which, and how many, employees opted to accept one of the above programs, Hydro issued surplus notification letters. Between November 8 and December 6, 1551 employees received surplus notification letters. Of this number, 1377 were members of the applicant, 139 members of the Society, and 35 were not represented by a union.

11. About the same time, 1100 PWU vacancies were posted. Some of these were vacancies which were unconnected with the downsizing program, and some of these vacancies were necessitated by the voluntary departure of their incumbents.

12. There is no necessary correspondence between the employees receiving surplus notices, and the employees who may eventually be laid off. This is because of the operation of two aspects of the collective agreement between Hydro and the PWU, the "search notice" provisions, and the "displacement" provisions. The receipt of a surplus notice means that for a specified period of time (known as the "search notice period"), surplus employees are given selection priority in the filling of vacancies. Thus, many of the employees given surplus notices end up with other jobs within Hydro. Further, at the end of the search notice period, a displacement process begins under which surplus employees have the opportunity to displace other, more junior employees. There is a first round of displacements, whereby surplus employees are given an opportunity to displace other employees. There may be further rounds of displacements if displaced employees are themselves eligible to displace other employees.

13. We do not need to provide a comprehensive description of the vacancy selection procedures and displacement procedures for surplus employees under the collective agreement. It suffices at this point to simply observe that the parties have negotiated elaborate procedures for deal-

ing with layoffs which are administered in part by Hydro and in part through a joint management-union displacement team.

14. On December 20, 1993, the PWU sent written notice to Hydro of its desire to bargain an adjustment plan under section 41.1 of the Act. Hydro responded on December 23, stating its position that the provisions of section 41.1 did not apply to its downsizing activities.

15. Since the fall of 1993, the parties had been engaged in collective bargaining. On March 30, 1994, after the hearing in this matter, the parties reached settlement on the terms of a new collective agreement, to be effective from April 1, 1994 to March 31, 1996. This agreement was ratified by the union's members on May 2.

16. The new collective agreement includes provisions which affect those surplus employees who still remain with the corporation. Most important of all is an agreement to continue the employment of these persons until March 31, 1996, the expiry date of the collective agreement. In addition, there are changes to the provisions governing the placement of surplus staff in vacancies, and the provisions governing displacement procedures. It is clear from the Memorandum of Agreement which was placed before us that the parties have, during the course of collective bargaining, put their minds to the very issues which would have been the subject of adjustment plan negotiations. More than this, they have agreed upon some provisions, both general and detailed, which deal with the rights of surplus employees. Whether or not the parties characterize the collective agreement as an "adjustment plan" for the purposes of section 41.1, it is clear that the parties have negotiated adjustment plan issues during the course of their collective bargaining.

17. As we have indicated, Hydro takes the position that the issues before the Board in this application are now moot as a result of the provisions of this new collective agreement. Mootness has been applied in the judicial context to situations where because of events subsequent to the initiation of an action, a live controversy or concrete dispute has disappeared: see, for instance, *Borowski v. Attorney-General of Canada*, (1989) 57 D.L.R. 231 (S.C.C.), to which the Board was referred by the parties. A court may choose, for reasons of judicial economy, not to proceed with cases that have become moot. Or, where an issue of public importance is raised or the case raises issues which are recurring, a court may decide that it is justified to proceed to determine an issue even after it has become moot.

18. Often, it is not difficult to determine whether a live controversy has ceased to exist. In the case before us, the parties disagree on this. In particular, the applicant disagrees that the negotiation of adjustment plan issues by the parties during collective bargaining has resolved all of the matters which would be the subject of adjustment plan bargaining. This, however, is too narrow a view of the matter, for it ignores the fact that the remedies sought in the current complaint relate precisely to a *process* of negotiations, and not to an end result. In other words, to the extent that the applicant's purpose in bringing this application is to compel the employer to engage in negotiations towards an adjustment plan, the fact that the parties *have* negotiated adjustment plan issues and have had the full opportunity to negotiate adjustment plan issues informs the Board as to whether the parties have in a practical sense resolved the issues which underlie this application. The fact that the agreements arrived at by the parties do not cover *all* of the matters which could be the subject of an adjustment plan is not relevant.

19. We are therefore satisfied that the parties have resolved in a practical way the issues which were the subject of this application, in that they have decided, during the course of collective bargaining, to negotiate provisions relating to the rights of the surplus employees at issue.

Applying the judicial notion of mootness, the “substratum of the applicant’s case” disappeared when the parties negotiated and agreed upon matters which were the very matters the applicant sought to have the Board direct Hydro to negotiate. This is so whether or not the parties *actually* canvassed all of the potential subjects of adjustment plan bargaining, and whether or not the parties call the agreement reached an “adjustment plan”. What is important is that they have had the opportunity to negotiate on these matters.

20. Under the judicial doctrine of mootness, a court may still decide to proceed with a case where there are other reasons, such as an issue of general importance, which make it desirable for a decision to be rendered. We find no such compelling reasons in the case before us. Although this is the first case concerning section 41.1 which the Board has considered, that in itself is not a sufficient reason to decide the matter. Further, the desirability of obtaining the Board’s reflections on the application of section 41.1 is outweighed in this case by other labour relations considerations, referred to below.

21. For apart from the doctrine of mootness, the Board also has the discretion to refuse to order remedial relief under section 91(4) of the Act. The circumstances which lead us to view the issues as moot, and decline to render a decision on the merits, also militate against the granting of relief in this case. Where the parties have had the full opportunity to negotiate over the issues which would be the subject of adjustment plan bargaining, and have even reached agreement on some of these issues, it would be contrary to good labour relations sense and would undermine the agreements reached and the give and take in which the parties have engaged, to order further bargaining on these issues. This is particularly so where the parties have engaged in negotiations over adjustment plan issues as part of a process of collective bargaining which provides *greater* incentives to engage in meaningful negotiations (by way of economic sanctions and the possibility of imposition of terms by the Board) than the process provided for under section 41.1. Even assuming therefore, without deciding, that Hydro has violated section 41.1 of the Act by refusing to negotiate an adjustment plan, we are satisfied that no remedial relief ought to be granted in this case, since to the extent that the remedy sought is a direction to compel the employer to negotiate, this end has already been achieved.

22. There is no question that section 41.1 adds an additional and possibly independent duty to bargain to the parties’ pre-existing obligations under section 15. In reality, the addition of section 41.1 to the Act has most meaning where the parties face the circumstances described in that section at a time when they are not engaged in collective bargaining. When the circumstances arise during or near collective bargaining, there is no reason why the same issues could not be addressed during those negotiations. In fact, we would expect that where the union wishes to bargain about these issues during collective bargaining, an employer has an obligation to address them. In such a case, it is difficult to see that section 41.1 adds anything more to the obligations under section 15 than already exist.

23. When we ruled against the employer’s motion at the outset of the case, to decline to inquire into the complaint on the basis that the parties were engaged in collective bargaining, it was not apparent to us that either party had any desire to deal with adjustment plan issues at the bargaining table. It was not apparent that there could not be a situation where the parties might engage in both collective bargaining, and adjustment plan bargaining. The situation today is quite different, however, and as we have discussed above, the incorporation of discussions over adjustment plan issues into the parties’ collective bargaining is a concrete course of events which influences the wisdom of remedial relief in this case.

24. For the reasons above, the Board dismisses the application on the grounds that it is

moot, and on the grounds that it would serve no labour relations purpose to inquire further into the application because no remedial relief would be ordered.

3398-93-U, United Food and Commercial Workers International Union, Local 175 and 633, Applicant v. **Pharmaphil**, A Division of R.P. Scherer Canada Inc., Responding Party

Interference with Trade Unions - Intimidation and Coercion - Unfair Labour Practice - Board finding employer's remarks to group of employees calculated to use promises to undermine union's legitimate authority as bargaining agent and thus interfering with union's representation of its members - Application allowed

BEFORE: *K. G. O'Neil*, Vice-Chair, and Board Members *J. A. Ronson* and *D. A. Patterson*.

APPEARANCES: *Georgina Watts* and *Larry Bain* for the applicant; *Patrick F. Milloy* and *Joseph Clark* for the responding party.

DECISION OF K. G. O'NEIL, VICE- CHAIR AND BOARD MEMBER D. A. PATTERSON;
June 29, 1994

1. The style of cause is hereby amended to reflect the correct name of the responding party: "Pharmaphil, A Division of R.P. Scherer Canada Inc."
2. This is a complaint under section 91 of the *Labour Relations Act* alleging that the employer, referred to as Pharmaphil or the company below, breached sections 65, 67, and 71 of the *Labour Relations Act*. The union alleges that the president of the company offered incentives to decertify the union, indicated employees would be better off without a union, made disparaging remarks about the union, and tried to bargain individually with employees. The company says, by contrast, that the conversation in question was a sociable one with acceptable give and take, and there was no breach of the Act.
3. The company manufactures gelatin capsules for nutritional and pharmaceutical uses. Its president, Joseph Clark is relatively new, having come to Windsor a little over a year ago. However the bargaining relationship between the parties has been in place for over twenty-eight years. The collective agreement currently in effect expires in June, 1994, approximately six months after the conversation in issue.
4. It is common ground that on December 6, 1993, Joe Clark, President of the employer was in the cafeteria. He spoke to approximately seven employees who were seated around a table chatting and having coffee before their shift started. We heard the evidence of four people who were present at the conversation: Joseph Clark, for the company, and Doug Gerard, Charles Granger and Paul Hearn for the union. There is dispute about exactly what was said, and by whom. However, having considered the various accounts, we have concluded that there is more common ground than conflict in the evidence, and that all the witnesses were attempting to be frank with the Board. For instance, it is agreed that the whole conversation was over in less than fifteen minutes, and that the gathering was an impromptu one, not organized or required by the employer. The conversation started out socially with Mr. Clark inquiring after the new child of one

of the men there. It went on to cover a number of topics. There is some dispute about the order of topics, but all the witnesses were consistent about what they were: small talk, upcoming contract negotiations and Mr. Clark's belief in the wisdom of incentive plans. As well, all concerned found the tone of the conversation light and unoppressive. As one might expect of an informal cafeteria conversation, not everyone heard or remembered everything that was said.

5. Having considered the various accounts, we have concluded that the nature of the conversation can be characterized in the following manner. Mr. Clark, a gregarious individual, with a background as a salesman, took the opportunity presented to him to expound on two subjects near to his heart, and important to him as a businessman. They were his impatience with how long it had taken to negotiate a collective agreement in the last round of negotiations, and his frustration that an incentive program that he believed would be beneficial to the company and his employees had been voted down. The issue for determination is whether in expressing himself as he is entitled to do, he crossed the line into interfering with the union's representation of its employees, exercised undue influence, coercion or bargained with individuals.

6. In the course of talking about the length of negotiations, Mr. Clark floated the idea of getting together people from the plant to hash out issues before they got the company's lawyers and the union's business agent involved. He added that when he does commercial negotiations for the company they go much more quickly. In this context, Clark says he asked why "do we need a union and the lawyers involved early on." He was clear in his own mind that he was talking about meeting with local representatives of the union rather than individual employees. Douglas Gerard, union steward, and the person Mr. Clark felt he was mainly talking to, recalled Mr. Clark's having said instead, "Why do we need a union involved when everything is going so well." Mr. Gerard then explained how the process went from the union's point of view, that it was a democratic process that took time involving consultation with the members. As to negotiating at the plant level first, that it would have to be discussed with the stewards and the committee. Mr. Granger's recollection of this was that the reason Mr. Clark gave for wanting to work things out with the stewards first was that the union was not doing the best job. Mr. Hearn's recollection was that Mr. Clark wanted to forget about the lawyers and get the contract done early.

7. When Mr. Clark was dealing with the incentive program in this conversation, he says he posed the question to the group whether, when a particular employee did outstanding work, he should be able to reward that. He testified he then said directly to an employee, "If you had an outstanding month, wouldn't you like to have an extra two hundred dollars, or if you're a golfer and you deliver exceptional performance, maybe we could offer you a trip to Florida for golfing". Mr. Gerard and Mr. Hearn recall that Mr. Clark mentioned trips to Florida and then an employee mentioned golfing, and another fishing; Mr. Clark casually accepted the idea or said he could look into it.

8. Mr. Gerard became concerned when Mr. Clark started talking about trips to Florida, so he asked him about the particulars of the program proposed last time by management (which had nothing so enticing in it). Mr. Clark described the incentive plan as a grid of remuneration tied directly into downtime and rejects which would provide monetary incentives as the level of scrap decreased. Mr. Gerard recalls that Mr. Clark continued saying if it had been put into place the men would have had two hundred dollars in their pockets, and that it was because of the union that this did not happen.

9. While this discussion of the incentive program was going on, Mr. Clark noticed that Sterling Gabbitas, a financial officer of the company, had joined the group. Mr. Clark asked Mr. Gabbitas if he was "over the line" and Mr. Gabbitas nodded that he thought so. Other witnesses

confirmed this, and Mr. Gerard added, "Yeah, Joe, the line is behind you somewhere. " Mr. Clark explained his question to Mr. Gabbitas as being due to the fact that he is aware that when discussions like this take place that it should be between management and the shop steward, and he was not clear whether the comments were appropriate with the other employees present. Once Mr. Gabbitas had indicated that Mr. Clark was over the line the conversation came to an end, and Mr. Clark went to talk to Mr. Gabbitas which had been his original intention.

10. Reactions to Mr. Clark's comments among the employees varied partly according to the amount of exposure they had had to Mr. Clark before. Some took Mr. Clark's comments as encouragement to get rid of the union while at least one thought it was just talk, and nothing to be concerned about.

11. In argument company counsel asked us to accept Mr. Clark's evidence, and find that Mr. Clark was not discussing the contents of negotiations but suggested procedure. He never made a suggestion to decertify or bring a termination application. In any event, notes counsel, he was dealing with one of the on-site representatives of the union, the steward, who had no difficulty answering Mr. Clark about the democratic process, and the conversation did not go any further than that. Counsel asks us to find that Mr. Clark was putting his mind to negotiations of the upcoming agreement *with* the union, not decertification of the union, which would have meant he did not have to deal with the union or the stewards.

12. On the question of the incentive topic in the conversation, counsel says that if the Board accepts Gerard's evidence that he asked him how the incentive program works, it changes the whole context of the conversation as he would be simply responding to an inquiry from the steward. His comments were in the context of a specific plan which had been floated, but had not been successful, and of Clark's general statement that incentive plans were a good idea, says counsel, and not a promise for a specific action like decertification. We are asked to find that Clark never said he was going to negotiate with the employees, that it was with the stewards.

13. Further, company counsel urged us to find no violation of section 65. There was no interference with the administration of the union or its representation of the employees. All that was done was a suggestion that negotiations could be done quickly, in response to impatience expressed by an employee, which was not pursued once the steward said things do not go that way. Counsel argues this is not coercive or unduly influential. Once he realized the topic was better left to be dealt with the union, he moved on. There is no threat in the conversation, nor any bargaining with anybody individually, therefore no violation of sections 67 and 68, says counsel.

14. By contrast the union says that these were violations, if not gross ones, critically timed before the start of negotiations. And although it was an established collective bargaining relationship, Mr. Clark was a new player. Union counsel notes that three witnesses say that Clark initiated the conversation on negotiations. She said that he saw an opportunity to make anti-union comments and took it. Counsel argued that Mr. Clark could not identify the people who had made the remarks he said they made, so his recall is faulty on some of this therefore, the evidence of the union witnesses that he initiated the conversation should be accepted. Counsel said that the whole conversation was undermining the union even if he was just talking about the process. The whole picture is that if you get rid of the union, we can work out a deal quicker and faster, with great things like incentive programs and have two hundred dollars more in your pocket. Company counsel argued that the fact that the incentive program was unilaterally implemented three months later means it was not an incentive only to be granted on decertification. Union counsel notes that is irrelevant in December because the employees did not know that was going to happen.

15. Union counsel says Mr. Clark is entirely too sophisticated to actually use the work

decertify; he found a nicer way to do it. Clark admitted saying that employees would have had two hundred dollars if it was not for your union, says counsel. Union counsel summarized by saying that the evidence shows three main facts. One, Clark began the conversation by saying why did they need a union. Several witness recall this. He expressed frustration with the process, and in doing so encouraged employees to bargain without their bargaining agent. Two, he talked about the incentive program which had been turned down by the union. This is a direct attempt to demonstrate to the employees that the union was not very good or not looking out for its employees. Three, he held out the prospect of doubling wages, and said he could not do it because of the union rules. Counsel says this is not a very subtle message. If you get rid of the union, you would be better off, and the employer will take care of you. Union counsel referred to *The Globe and Mail*, [1982] OLRB Rep. Feb. 189; *Manor Cleaners Limited*, [1982] OLRB Rep. Dec. 1848; *Saverio A. Greco*, [1976] OLRB Rep. June 323; *Trulite Industries Limited*, [1983] OLRB Rep. May 821; after April 821; *Globe Spring & Cushion Company Co. Ltd.*, [1982] OLRB Rep. Sept. 1303.

16. Union counsel asked us to find that the facts before us are similar to the cases in which the company used reward and inducement rather than punishment to interfere with the union. Union counsel says Mr. Clark took advantage of his power and the circumstance in the cafeteria. Although the employees were not required to be there, counsel characterizes it as a captive audience meeting because people do not walk out when their boss is speaking. Counsel argues that *Manor Cleaners*, cited above, stands for the proposition that you cannot try to say that the employees are better off without a union. Clark's message was that they would get a better contract without a union. Although this is not as sensitive a time as with an application for certification, counsel underlines that it was right before negotiations, and it is vital for the bargaining agent to have support of its members at that time.

17. Counsel argued that the *Greco* case, cited above, shows that seeking to compel is what is illegal, one does not have to succeed. Therefore, it does not matter that the steward was not overly concerned about the remarks. It obviously had an effect on other employees.

18. In reply, company counsel said that although *Globe Spring & Cushion*, cited above, is a nice launching pad for union counsel's argument, it is not the facts before this panel. In that case there was a three hour meeting in which contract proposals were made back and forth with employees during a strike. Nor does company counsel accept that December is on the eve of negotiations for a contract that expires in June.

19. We are of the view that Mr. Clark's remarks, which included the suggestion that but for the union's stance at the table, they might be in Florida or have two hundred dollars in their pockets, was reasonably calculated to use promises to undermine the union's legitimate authority as exclusive bargaining agent and thus interfered with the union's representation of its members. Although Mr. Clark may have viewed this incident as within the context of explaining why he believes in incentives, the Board has always been cautious where rewards are linked with messages which involve the circumvention of the bargaining agent.

20. However, these remarks were not made at a particularly sensitive time in our view. Nor did Mr. Clark persist when he began to feel uncomfortable himself. It is our impression from observing Mr. Clark that he has no intention of recreating similar situations, where unobjectionable social conversation went a bit too far.

21. A declaration of a breach of the Act is in order. Given the circumstances, we find no further remedy appropriate.

DECISION OF BOARD MEMBER J. A. RONSON; June 29, 1994

1. We are dealing with a bargaining relationship of over 28 years. In such a situation the Board, with its expertise, was always wary of allowing itself to be used by either party to enhance their relative bargaining power during negotiations. This case departs from that time-honoured and *purposeful* rule.

2. We can examine and dissect the conversation between Mr. Clark and his employees to the last parse, but what will not change is that this complaint is being brought at the instigation of a union business agent whose bargaining acumen was disparaged before a small group of union members.

I know that it was not brought on the instigation of the employees themselves - I was there when their evidence was reluctantly given. This case is nothing more than an attempt to get even.

3. There was no intent by Mr. Clark to take unfair advantage of his position and authority in an attempt to sway the will of the employees. And, in fact, the employees did not feel threatened. This is not a case involving a union organizing campaign or a newly established bargaining relationship. It is not a situation in which employees are likely to be particularly sensitive to what Mr. Clark had to say. In fact, the union steward present at the conversation described Mr. Clark's utterances as "wind".

4. In previous cases the Board has said that the shop floor is not a debating society. Further the Board has realized and accepted that the limits on cut and thrust debates on the shop floor in a 28 year relationship differ greatly from the standards imposed on a first contract situation. And in a long-standing relationship when the parties start acting childish the Board has not hesitated to so describe their conduct and give them the necessary nudge to return to the table as responsible adults.

5. With respect to anti-union motivation the Board said this in *American Can Canada Inc.*, [1983] OLRB Rep. Oct. 1609:

Although there has been some equivocation in the Board's jurisprudence concerning whether or not anti-union motivation is an essential element of section 64, in *International Wallcoverings*, [1983] OLRB Rep. Aug. 1316, the Board, after thoroughly reviewing the pertinent jurisprudence and policy considerations, indicated that in appropriate cases where there is a clear imbalance of interests in favour of protected activity, the Board will be prepared to adopt a "non-motive approach to section 64", such as in instances of clear mistake or discipline clearly out of all proportion to the misconduct in issue. The present case involves neither anti-union motive nor a clear imbalance of interests in favour of protected activity. However, even if it were to be assumed that this is an appropriate case in which to adopt a non-motive approach in respect of section 64, the complainant's case would not succeed since it has not established that the respondent's impugned actions have in any way interfered with its administration or representation of bargaining unit employees, or that it has in any other way (contemplated by section 64) been adversely affected.

6. The conversation between Mr. Clark and his employees did not cross the boundary between freedom of expression and undue influence. But one can only hope that the next time he speaks disparagingly of the union position and its officials it will occur also at the bargaining table. That way the Board's time equal to that spent dealing with this case will remain available to deal with other truly serious matters. This complaint should be dismissed.

0940-94-M Royalguard Vinyl Co., A Division of Royplast Limited, Applicant v. United Steelworkers of America, Responding Party

Certification - Interim Relief - Practice and Procedure - Reconsideration - Stay - Employer applying for reconsideration of "bottom line" decision to certify union and seeking interim order staying Board's decision pending issuance of reasons for decision - Board explaining importance of avoiding delay in labour relations and practice of issuing "bottom line" decisions with reasons to follow - Balance of harm weighing against staying Board's decision - Application dismissed

BEFORE: *Judith McCormack*, Chair, and Board Members *W. A. Correll* and *B. L. Armstrong*.

APPEARANCES: *Joseph Liberman*, *Douglas N. Dunsmuir* and *Alan Dias* for the applicant; *Mark J. Lewis*, *B. Paris* and *H. Desai* for the responding party.

DECISION OF THE BOARD; June 30, 1994

1. This case involves an application under section 92.1 of the *Labour Relations Act* brought by the company for an interim order relating to an application for reconsideration. The application for reconsideration itself was filed in connection with a decision of another panel of the Board certifying the union as the bargaining agent for certain employees.

2. To understand the company's current request, some background information is necessary. The original certification proceedings involved lengthy and contentious hearings which commenced in April of 1993. It is fair to say that the company strenuously resisted the certification application, making a number of allegations about the conduct of union supporters which required over forty days of hearing and evidence from some thirty witnesses. The hearings concluded in February of this year, and the panel of the Board hearing the case advised the parties that it would attempt to issue a "bottom line" decision as soon as possible. The company acknowledges that no objection was taken at that time to the matter of a bottom line decision. On June 6th, a decision in such a format was issued. That decision includes the following relevant passages:

2. In the circumstances of this case, the majority of the Board finds it appropriate to render a "bottom line" decision at this time. Fuller reasons for the decision will be issued at a later date.

3. In response to the application for certification, the responding party and the intervenor alleged that a number of union organizers had attempted to obtain membership evidence through coercion.

4. After having carefully considered the evidence and arguments submitted by the parties, the majority concludes (Board member Rundle dissenting) that the responding party's and intervenor's allegations have not been substantiated.

3. The company then filed an application for reconsideration of that decision and brought this application for an interim order. By way of interim relief, the company asks the Board to direct the issuance of detailed reasons for the certification decision, to stay the effect of that decision pending the issuance of those reasons, and to advise it when the reasons will issue.

4. Section 92.1 provides as follows:

92.1-(1) On application in a pending or intended proceeding, the Board may grant such interim orders, including interim relief, as it considers appropriate on such terms as the Board considers appropriate.

(2) A party to an interim order may file it, excluding the reasons, in the prescribed form in the Ontario Court (General Division) and it shall be entered in the same way as an order of that court and is enforceable as such.

5. The language of section 92.1(1) makes it clear that the Board has a large measure of discretion in determining applications for interim relief. In exercising that discretion, the Board has now developed a considerable body of jurisprudence. Generally speaking, the Board looks at both whether the applicant has an arguable case for the remedy requested in the main application, and at the balance of harm between the parties (*Loeb Highland*, [1993] OLRB Rep. March 197).

6. With this basic framework in mind, the Board has also considered such factors as delay, and whether the harm is purely economic (*Morrison Meat Packers Ltd.*, [1993] OLRB Rep. April 358, *Price Club Canada Inc.*, [1993] OLRB Rep. July 635, *Blue Line Taxi Company Limited*, [1993] OLRB Rep. Aug. 793 and *section catholique du Conseil scolaire de langue française d'Ottawa-Carleton*, [1993] OLRB Rep. Sept. 844), the preferred labour relations circumstances to be preserved or created on an interim basis (*Morrison Meat*, *supra*), the preservation of a meaningful remedy on the main application (*Reynolds-Lemmerz Industries*, [1993] OLRB Rep. Mar. 242), the effect on the process of collective bargaining or the collective bargaining relationship (*The Hydro-Electric Commission of the City of Ottawa*, [1993] OLRB Rep. Nov. 1231, *Metropolitan Toronto Apartment Builders Association* [1993] OLRB Rep. Mar. 219, *The Bay-Kingston*, *et al*; [1993] OLRB Rep. Dec. 1350, and *Fort Erie Duty Free Shoppe Inc.*, [1993] OLRB Rep. Dec. 1307), the scheme of the Act (*Tate Andale Canada Inc.*, [1993] OLRB Rep. Oct. 1019 and *The Bay-Kingston*, *supra*), and broader public or labour relations policy considerations (*The Bay-Kingston*, *supra*, *Fort Erie*, *supra*, and *section catholique*, *supra*). The Board's assessment takes place in the context of its specialized expertise in labour relations and the administration of the statutes it applies. (*Loeb Highland*, *supra*, *Morrison Meats*, *supra*, and *Tate Andale*, *supra*).

7. The case before us presents the Board with the first occasion on which the Board has addressed a request to stay a final decision. In these circumstances, another ingredient in the Board's consideration must be the importance of finality and certainty in the litigation process. More specifically, while we agree with the company that the general framework of the Board's approach remains the same in the sense that it will look to whether there is an arguable case on the main application and the relative harm to the parties, the application of that approach may have a different effect in this context. For example, in considering whether there is an arguable case, the Board must make some rough measurement of the applicant's materials against the elements necessary for success on the main application. Where the main application is one of reconsideration, the fact that grounds for success are quite limited in this area will necessarily shape the Board's assessment to some degree.

8. As well, the Board's interim order jurisprudence is predicated at least in part on the proposition that "the imposition of relief before an adjudication on the merits is inherently problematic to some extent" (*Loeb Highland*, *supra*). Where the interim relief a party is seeking is to stay the effect of an adjudication on the merits of a case, other considerations with respect to the finality and certainty of the Board's decisions may apply.

9. In the matter before us, we turn first to the company's request for detailed reasons with respect to the June 6, 1994 certification decision. Since the Board in that decision indicated that fuller reasons would follow, there is no need for us to make any direction in this regard. Indeed, there is simply no issue with respect to whether more detailed reasons should or will be provided. As a result, even assuming that it would be possible for one panel of the Board to make a direction to another panel of the Board, such an order would be redundant. This effectively disposes of that aspect of the interim order application.

10. Turning next to the request for a stay of the decision pending the issuance of reasons, we find it useful to address the question of the relative harm to the parties first. It is not disputed that as a result of the certification decision, certain statutory obligations are triggered. Counsel for the company argues that the harm to the company warranting the granting of interim relief consists of requiring it to commence collective agreement negotiations without knowing the detailed reasons for the Board's conclusions in the certification case. These include the reasons for two procedural rulings and the Board's assessment of the relative credibility of various witnesses. Counsel asserts that the company should not be required to incur the costs of negotiations without being able to assess its position with respect to the viability of judicial review of the certification decision. He acknowledges that the Board has a long standing policy of declining to stay its decisions pending judicial review applications, but distinguishes this situation on the basis that the stay requested would be only for a brief period until the Board's detailed reasons issued, and not for the six to twelve months a judicial review application might take.

11. It is not apparent, however, that there is any connection between the details of the Board's reasoning in the certification case and the company's position in negotiations. We were not referred to any specific link, and the company's argument rested largely, if not entirely, on the proposition that the company should have an opportunity to assess its position with respect to judicial review before commencing bargaining.

12. As the parties acknowledge, however, it is extremely rare for the Board to stay its proceedings while matters are before a court or in the face of a pending application. (See, for example, *C.P. Fisheries Ltd.*, [1986] OLRB Rep. Nov. 1503, *Fotomat Canada Limited*, [1980] OLRB Rep. Nov. 1643, *Windsor Airline Limousine Services*, [1980] OLRB Rep. Feb. 272.) In *EKT Industries Inc.*, [1987] OLRB Rep. May 696, the Board indicated in a similar context that if the Board has the power to stay its own decisions, it should only be exercised in truly exceptional circumstances. Where the power it is to be exercised by a different panel of the Board than the one making the original decision, the Board noted that the circumstances must be even more extraordinary.

13. There are a number of compelling reasons for this approach. Chief among these, however, is the fact that stays are usually granted in an attempt to preserve the status quo. In the area of labour relations, this is often not possible because the delay attendant on a stay will itself result in a significant deterioration in the position of one or more of the parties.

14. The company's arguments in this case are somewhat difficult to distinguish from the Board's jurisprudence in this regard. If the Board does not stay its proceedings pending judicial review applications, it is not at all obvious why it should stay its proceedings so that parties can have the opportunity to assess whether they wish to proceed to judicial review.

15. The company cited to us the case of *Wells Fargo Armcar, Inc. v. Ontario Labour Relations Board* (1981), 34 O.R. (2d) 99 where the Court addressed an application for leave to apply to a judge of the High Court for judicial review rather than an application to Divisional Court. In determining whether the case was one of urgency and whether the delay required for a Divisional Court application was likely to involve a failure of justice, the court considered whether final decisions in negotiations from the parties would be required before such an application would be heard. Osler, J found that such final decisions would be unlikely in the three and one-half month period an application to Divisional Court would probably take at that time. The court then went on to decline to stay the Board's decision as well.

16. Counsel refers to this case as indicating that we should also consider whether final decisions would have to be made in negotiations pending the issuance of detailed reasons. However,

we observe that such a consideration would militate against a stay on the facts before us as well, given the even shorter period of time for which the stay is requested.

17. The costs the company might incur in commencing collective bargaining did not appear particularly compelling. In the first place, they were not quantified, and consequently we have no sense of whether they would be significant or minimal. The union also argued that in any event, the Board has held that pure financial harm is not likely to result in an interim order, relying on *Morrison Meat Packers Ltd.*, [1993] OLRB Rep. April 358 in this regard. We do think *Morrison Meat Packers* and the other cases in this line are distinguishable from the situation before us in the sense that they are based on circumstances where such financial harm can be adequately compensated by appropriate remedies in the final decision on the main application. This is not such a case. On the other hand, the costs issue is difficult to separate from the Board's jurisprudence referred to above where the possibility of similar costs to a party has not deterred the Board from continuing with hearings or enforcing its decisions.

18. In contrast, the harm to the union of staying the Board's certification is considerable. As the Board observed in *Loeb Highland*, both the Board and the Courts have recognized the corrosive effects of delay in labour relations:

32. Moreover, both the Board and the Courts have long recognized that delay poses special problems in labour relations matters. In *Consolidated-Bathurst Packaging Ltd. v. I.W.C.*, *Local 2-69* (1984) 2 O.A.C. 277, the Court noted:

... there is a fundamental principle of labour law that injustice and detriment to the labour relations of an employer and employee will result if the process is delayed. In my opinion, it is fair to say that the thrust of jurisprudence not only in the Board but in the courts may be summarized by saying:

In the law which has grown up around labour relations in this province and indeed elsewhere where the common law is pursued, the overriding principle invariably applied is that labour relations delayed are labour relations defeated and denied: *The Journal Publishing Company of Ottawa Ltd. v. The Ottawa Newspaper Guild*, Ont. C.A. released May 17/77 (unreported) [since reported [1977] 1 A.C.W.S. 817 (Ont. C.A.)].

Similarly, in *Re United Headwear and Biltmore/Stetson (Canada) Inc.* (1983), 41 O.R. (2d) 287, the Court commented that delay in labour relations matters often works unfairness and hardship. To some extent then, the Board must ensure that delay does not in itself decide a case.

19. This is particularly so in certification cases. In *Bemar Construction (Ontario) Inc.*, [1992] OLRB Rep. May 565 the Board made these comments:

19. It is now well established that "time is of the essence" in certification matters - especially in the construction industry where commercial activity and employment opportunities are transitory. In the words of Estey, C.J.O. (as he then was), the "overriding principle invariably applied, is that labour relations delayed are labour relations defeated and denied" (see *Journal Publishing Company of Ottawa Limited v. Ottawa Newspaper Guild, et al*, [unreported March 31, 1977, Ontario Court of Appeal]. In *Hotel and Restaurant Employees et al v. Nick Masney Hotels Limited*, (1970) 70 CLLC ¶14020, Laskin, J.A. put it this way:

"The Ontario Labour Relations Board deals in certification matters with fluent situations which cannot be judged by the more leisurely standards that operate in the prosecution of a claim for damages for a tort or for a breach of contract, where the situation is fairly well frozen when the tort or the breach of contract has occurred. Expedition is important to the union, to the employees, and to an employer, and certification is merely the first step of a laborious collective bargaining process".

This proceeding involves a certification application, as well as an application under section 126 of the Act; moreover, the Legislature has itself indicated the need for expedition in section 126 proceedings by prescribing that the Board must hold a hearing within fourteen days of the filing of such applications.

(See also *Hawk Security Systems Ltd.*, [1993] OLRB Rep. Aug. 751, *Pinkerton's of Canada Ltd.*, [1989] OLRB July 783 and *Canada Dry Bottling Company (Kingston) Ltd.*, [1978] OLRB Rep. Nov. 976.)

20. The Board has recognized that the economic dependency of employees on their employer makes a union organizing drive a relatively fragile enterprise. Employees who perceive their employer as hostile or resistant to unionization may be apprehensive about taking steps which may alienate the source of their livelihood or those who control their working conditions. In this context, delays in the certification process can erode employee support for collective bargaining by suggesting to them that it represents a risk without benefits. They may also prolong a period of uncertainty involving considerable tension in the workplace. As the Board noted in *A & L Canada Laboratories East, Inc.*, [1992] OLRB Rep. Sept. 983, delay in certification cases is measured in days rather than weeks or months because of its potential to undermine the appetite of employees for collective bargaining. For this reason section 6(2) of the *Labour Relations Act* specifically provides an interim certification power in certain cases pending the conclusion of the certification litigation. The Board has also developed sophisticated pre-hearing procedures in certification applications to provide for their expedition, together with a fast track for hearing them, along with other time-sensitive cases. There is little doubt that this is an area where the Board must be constantly vigilant that cases are determined on their merits, rather than by delay.

21. In the case before us, the vulnerability of employees is further highlighted by the fact that the Board found that the company violated the *Labour Relations Act* by certain conduct during the period of the certification litigation. The parties are also involved in the litigation of other unfair labour practice complaints as well. The declaration filed by the responding union asserts that the delay and uncertainty of the previous certification litigation has contributed to an undermining of support for the union and the willingness of employees to engage in effective collective bargaining. In these circumstances, the harm caused by further delay is likely to be significant.

22. The company argues that there has been such substantial delay already in this matter as a result of the lengthy litigation that more will not make a material difference. We do not find this a particularly compelling proposition. The integrity of the Board's processes requires that we minimize delay in these circumstances to the extent possible. There is nothing in the declarations of either the company or the union to indicate that the situation is such that it could not deteriorate further. Moreover, certification often represents an opportunity for a greater degree of stability after the tension and insecurity of the pre-certification campaign, albeit in the new paradigm of a collective bargaining regime. (See, for example, *Cooper Industries (Canada) Inc.*, [1994] OLRB Rep. March 225.) Staying a certification decision does not merely represent additional delay; it also has the effect of thrusting the parties back into the more volatile and uncertain environment preceding certification.

23. A further consideration with respect to harm is the fact that a stay would eliminate the value of a bottom line decision. The Board's practice of issuing such decisions with fuller reasons following at a later date represents a careful balance between two important and competing elements.

24. The first involves the importance of reasons for quasi-judicial decisions generally. The fundamental nature of reasons in the scheme of administrative justice is reflected in the require-

ment for reasons in section 17 of the *Statutory Powers Procedure Act*. This is given added emphasis in the field of labour relations which often involves two or more constituencies engaged in fundamental or perennial economic conflict, or aggressive litigation on flashpoint issues. In this highly charged atmosphere the Board's decisions are often monitored closely, and providing a stable and authoritative forum for dispute resolution is a challenging task. Detailed reasons can play a valuable role in explaining the Board's decisions on complex matters to a frequently divided, vocal and sensitive community, as well as assisting an unsuccessful party in reconciling itself to what it perceives as a difficult or unpalatable result. The importance of reasons is highlighted in cases involving new areas of law or controversial legislation. The Board's considerable reputation and authority is based in no small measure on the jurisprudence it has developed over the last fifty years.

25. Of course, many of the Board's cases require only brief reasons, and the parties are often content to have these delivered orally. It is not surprising however, that in a case involving contentious issues and over forty days of hearing, the Board might wish to issue detailed written reasons.

26. At the same time, detailed written reasons can entail considerable delay, and as we have noted previously, expedition is critical to the integrity of the Board's processes. In certification cases, delay alone can extinguish any meaningful opportunity to exercise the various rights set out in the *Labour Relations Act*. In other cases such as unlawful strikes and lockouts, delay can have a major economic impact. The Board is also faced with an increasing number of statutory deadlines for hearing or determining cases. Examples are contained in section 126, 41 and 92.2 of the *Labour Relations Act*. Perhaps the most stringent time lines are set out in section 92.2, which provides that the Board must commence hearing certain cases within fifteen days, hear them on consecutive days from Mondays to Thursdays, and render its decision within two days after the hearings are completed.

27. In balancing the importance of reasons with the need for expedition, the Board has developed the practice over the last decade of issuing bottom line decisions with reasons to follow. In this manner, parties are provided with a faster result, but receive the benefit of written reasons subsequently. Indeed, even between these two parties a number of bottom line decisions have been issued by the Board without objection from either party at the time.

28. Of course, the value of this solution is not confined to the Board. As the Ontario Court of Appeal said in *Crocker et al v. Sipus* (1992), 95 D.L.R. (4th) 360:

Careful deliberation, expeditious disposition, and the giving of comprehensive reasons, are often competing goals of justice in busy trial courts. The preparation of reasons, whether to be delivered orally or in writing, is an important part of the deliberation process which leads to the disposition of the issues. The entire process may sometimes be condensed into the delivery of brief reasons immediately after the hearing. Such is not, however, invariably the case. The needs of justice in a given case may be better served by an announcement of the disposition of the matter as soon as the deliberation process is completed but before full written reasons can be made available to the parties.

29. In this case, the majority of the panel determined that it was appropriate to issue a bottom line decision. An interim order staying the effect of that decision until fuller reasons issue would effectively nullify that determination. This tends to underscore the inappropriateness of an interim order in the circumstances before us.

30. The applicant's written submissions appear to focus in part on the fact that the June 6th decision was not unanimous, either on the merits of the case or with respect to the determination to issue a bottom line decision. In a tripartite system of administrative justice where one member

of a panel is representative of employers and one representative of employees by virtue of section 104(9) of the *Labour Relations Act*, disagreements are not uncommon. This is particularly so in the complex and delicate area of assessing the relative credibility of witnesses, which both parties agreed was the crux of the certification decision. Section 104(11) stipulates that the decision of the majority, or where there is no majority, the Chair or Vice-Chair, governs. We do not find the fact that there was disagreement either with respect to the merits or the format of the decision to have significance with respect to the matter of an interim order.

31. We therefore conclude that the harm likely to result from the interim relief requested outweighs any harm to the applicant if such relief is not granted. As a result of our conclusions in this regard, it is not necessary for us to consider the matter of whether the applicant has an arguable case on the merits of the main application. We would merely draw the parties' attention to the Board's jurisprudence setting out the quite limited circumstances in which the Board will reconsider its decisions.

32. Finally, the applicant requested that we advise it when the further reasons for the June 6, 1994 decision will issue. This is really a request for information from the Board, rather than an application for a remedy coming within the ambit of interim relief. Moreover, the timing of the issuance of those reasons is a matter entirely up to the panel which heard the case. We note in passing however, that only ten days elapsed between the bottom line decision and the company's request in this application.

33. The application for interim relief is dismissed. As a result, the Board's decision of June 6, 1994 continues in full force and effect. We wish to express our appreciation to counsel for their arguments which were both lean and cogent.

3437-92-U United Steelworkers of America, Applicant v. Tate Andale Canada Inc., Responding Party

Discharge - Discharge for Union Activity - Unfair Labour Practice - Discharged employees reinstated by different Board panel on interim basis pending determination of unfair labour practice complaint - At hearing on merits of unfair labour practice complaint, union also complaining about manner of interim reinstatement - Board finding employer in violation of the *Act* in respect of interim reinstatement by reinstating grievors to night shift and to job mix that was not reflective of range of duties normally performed - In respect of main complaint, Board finding employees' discharges tainted by anti-union *animus* and directing permanent reinstatement with compensation

BEFORE: *Roman Stoykewych*, Vice-Chair, and Board Members *R. W. Pirrie* and *C. McDonald*.

DECISION OF VICE-CHAIR, ROMAN STOYKEWYCH AND BOARD MEMBER, C. MCDONALD; June 21, 1994

1. This is an application under Section 91 of the *Act*. The applicant trade union has alleged that the employer, Tate Andale Canada Inc., during an organizing drive in February 1993, discharged its two internal union organizers for reasons related to their trade union activities. The union has alleged that in doing so, the employer has violated sections 3, 65, 67 and 71 of the *Act*.

2. In conjunction with the present application, the trade union applied under the provisions of section 91.1 of the Act for an interim order reinstating the two discharged employees. The interim application was heard by a differently constituted panel of the Board on March 1, 1993, and an order reinstating the two discharged employees on an interim basis issued on March 2, 1993 [*Tate Andale Canada Inc.*, [1993] OLRB Rep. Mar. 254]. Upon their return to work on March 3, 1993, a dispute arose as to the propriety of the terms and conditions upon which they were to be reinstated, and when the present matter came to hearing on March 11, 1993 under the provisions of Section 92.2 of the Act, evidence with respect to that issue was heard together with the other allegations of misconduct.

3. After seven days of hearing, on March 26, 1993 the present panel issued a decision in which it determined that the employer had violated the Act both with regard to the termination of the two employees and, (Board member Pirrie dissenting) to the manner in which they were reinstated. The Board ordered the reinstatement of the two employees on a permanent basis and made a number of other remedial directions concerning their reinstatement. At that time, we also indicated that the reasons for the its decision and directions would be provided to the parties. The following are those reasons.

4. The employer is a manufacturer of metal and cloth filtration screens used to separate particles from liquids in various manufacturing processes. The work, which is performed by approximately thirty persons in its Concord, Ontario plant, involves in large measure the welding, grinding and other fabrication of stainless steel, carbon steel and other materials using conventional metal fabrication equipment. There are two general classifications of employees in the shop, welder-fitters and labourers. The two discharged employees, Rod Cake and Heath Sweetman, were employed as welder-fitters. Both the welder-fitters and the labourers are supervised by the foreman, Brian Boucher. Also present on a regular basis, but providing little or no hands-on supervision with respect to the performance of work is the Vice-President and General Manager, Brian McBain. Both Boucher and McBain testified on behalf of the employer. Cake and Sweetman testified on behalf of the trade union.

5. Cake and Sweetman were heavily and visibly active in the certification campaign, although from the evidence it appears that Sweetman was the principal force. He testified that as a result of what he perceived to be insufficient wage increases given by the company in its annual review of wages in early January of 1993, he came to the view that a union could benefit all the employees in the plant. With that in mind, during January of 1993 he discussed the possibility of unionization with an unspecified number of his coworkers. After satisfying himself that there was sufficient support for a union drive, he contacted the applicant trade union in late January. On February 2, 1993, he and coworker Ken Relf attended at a restaurant near the plant to meet with Brando Paris, an organizer with the United Steelworkers. Sweetman received instructions from Paris as to the method of procuring membership evidence, and from that point onward until his dismissal on February 14, 1993, Sweetman was engaged in its collection.

6. Sweetman received the assistance of Rod Cake in this respect. Cake operated as an "advance man": both during and outside working hours, he would approach employees individually to determine whether they were likely union supporters and having done so, would advise Sweetman. Sweetman would then approach employees who had indicated an interest in the union in order to obtain their signatures on cards. The bulk of the discussions and of the collection process occurred in or around the workplace. Approximately one quarter to one third of the thirteen cards that were collected were obtained during working hours, often at the work-benches of individual employees. Finally, it should be noted that, although Ken Relf had attended at the initial meeting with Brando Paris, thereafter he played no active role in the organizing campaign. Sweet-

man and Cake were the only visible union organizers active in the plant. On the basis of the evidence of their activities, we have little difficulty in concluding that both Sweetman and Cake would have been easily identified as the key union supporters by most if not all the employees in the plant.

7. Both Sweetman and Cake were summarily discharged in the midst of the organizing campaign. Sweetman's employment was terminated by the employer on February 15, 1993, although he was provided two weeks pay in lieu of notice. At the time of his discharge, the employer declined to provide reasons for its action. Cake was discharged the next day, on February 16, 1993. The reasons advanced by the company at the time related to his failure to return an electric fan that he had misappropriated from the company more than a month earlier, on January 14, 1993.

8. In response to the allegations that the employer's actions were motivated by anti-union considerations, it was the position of the employer that both discharges were undertaken for reasons related to poor work performance. In the case of Sweetman, it was the employer's position at the hearing that the basis of the discharge was a long-standing performance problem. In the case of Cake, it was the employer's position that the discharge was motivated by the fan issue adverted to earlier, although there was also some suggestion that performance concerns also played a role in the discharge. Underlying the employer's position was the claim that, at the time of the terminations, the employer was not even aware of the existence of the union drive, let alone the nature of Cake and Sweetman's participation.

9. There was little dispute with respect to the applicable legal considerations in this matter and in particular, that the provisions of section 91(5) of the Act have application to the present circumstances. Further, it was not disputed that the test that the Board was to employ in reviewing the evidence was whether the considerations leading to the action taken by the employer were "tainted" by anti-union considerations (*The Barrie Examiner*, [1975] OLRB Rep. Oct. 745). Finally, it was not disputed that inherent in any such inquiry by the Board is a careful examination of the circumstances surrounding the employer's actions and the making of inferences with respect to the employer's motivation on that basis (*Pop Shoppe (Toronto) Limited*, [1976] OLRB Rep. June 299). The differences between the parties related almost exclusively to the inferences that the Board should draw on the basis of the evidence. It is with these considerations in mind that we turn to a review of the evidence.

Discharge of Heath Sweetman

10. Although at the time of Sweetman's termination the employer declined to give reasons for its actions, at the hearing it was the employer's position that he was terminated on the grounds of generally poor work performance, culminating in an incident in which a fire resulted from his careless welding practices. Sweetman commenced work with the employer in July, 1991. Having had little experience at welding prior to his hire, he was taken on as a "junior trainee welder" and throughout his employment he remained the least skilled and lowest paid welder-fitter at Tate Andale. As the lowest-skilled welder, Sweetman was also subject to layoffs such that during his relatively short tenure with the employer, he was laid off on two occasions for a total of 16 weeks.

11. Shortly after his hire, Sweetman was assigned primarily to the production of stock stainless steel screens, a welding operation which, although requiring no great welding experience, involved the "finesse" that Sweetman apparently displayed in his work. Both the evidence of McBain and Boucher was that Sweetman's rate of production of these screens was a source of long-standing concern that was related to him on a number of occasions. According to the company witnesses, the performance of each welding employee is subject to a weekly review of pro-

duction sheets, which are then compiled in a computer generated record system. These records disclose, according to McBain, the number of hours of work that have gone into the production of a given product. The records are carefully monitored, both for the purpose of ensuring that all labour charges are appropriately transferred to customers and, more significantly for the present purposes, of ensuring that the productivity of each individual employee is reflected in the wage rate. In this regard, it was the employer's evidence that, in general, there is a strong relationship between productivity and the wage rate received by each employee based on value-added considerations.

12. No production records were adduced in evidence. However, it was McBain's oral evidence that his weekly perusal of these records disclosed that the production times of Sweetman were consistently below the expected standard. With this in mind, he stated, in June and then again in October or November of 1992, he instructed Boucher to discuss this issue with Sweetman. In turn, Boucher testified that he not only informed Sweetman on both those occasions that his production rates were below the employer's expectations, but also instructed him as to certain work methods that would enhance his performance. According to Boucher, on both occasions Sweetman appeared to ignore his suggestions, and his productivity continued at an unacceptable level.

13. In addition, McBain stated that, in October or November of 1992, Sweetman was given a warning letter regarding his productivity by Brendan Mullett, who at that time was the employer's production manager. The employer's evidence is particularly poor in this respect. The letter was not adduced in evidence because, according to both Boucher's and McBain's evidence, Sweetman's employment file had gone missing from the company's personnel records. McBain stated that although he knew of the letter, of its general contents and that he had actually seen it, he had not read it. Brendan Mullett, the author of the letter, who was fired in October, 1992 was not called upon to testify.

14. The union disputed both the evidence of poor performance by Sweetman and the evidence that his performance had been the source of long-standing concern with the company. In particular, it relied on the undisputed evidence of a 15% wage increase received by Sweetman in early January, 1993, during the course of the employer's annual wage review. According to the trade union, this evidence is crucial because Sweetman received the increase less than a month from the date that the employer claims to have made the decision to terminate his employment for productivity reasons.

15. The evidence is undisputed that Sweetman was one of only four employees to receive a wage increase at the annual wage review in early January, 1993, and that the increase he received was by far the largest received by any of the employees in the plant. Moreover, it was the evidence of McBain that during the four months prior to the January wage increase, Sweetman's performance improved to a satisfactory level and that the wage increase was at least partly in response to that improvement. Sweetman acknowledged that he was approached by Boucher in June, 1992 with respect to production methods, and from this he understood that the company was not happy with his performance level at that time. However, he could recall no similar meeting in November, 1992. Moreover, he denied categorically the receipt of a warning letter of any kind during his employment at Tate Andale. He testified that the only specific mention of performance rates occurred in discussions in February of 1992, with the then production manager, Brendan Mullett. He conceded that, having actually performed the job only for a few weeks at the time (given the layoffs before that time), his productivity was below the rates set out in that conversion. However, he testified that thereafter he maintained the requisite production rates and performed his work without significant complaint from the company.

16. In addition to these general productivity concerns, the employer advanced as a reason for Sweetman's dismissal his careless conduct on January 25, 1993. On that day, Sweetman was assigned welding duties that involved the disassembly and demolition of a set of metal stairs leading up to one of the plant's mezzanines. Considerable evidence was led with respect to the specific circumstances and work practices utilized on that day, which is unnecessary to review in any great detail. It is sufficient to note that on the morning of January 25, 1993, while Sweetman was cutting a steel beam at the top of the stairs, molten metal and sparks from the cutting torch he was operating ignited some cardboard and other materials that were stored in a open closet beneath the stairs. A fire ensued that, although causing little actual property damage, disrupted entirely the operation of the plant for approximately one and a half hours and most importantly, endangered the safety of all present. The Board does not question the employer's assessment at the hearing that Sweetman was responsible for the development of this very hazardous situation, or that, had he acted more diligently, he would have ensured that any flammable materials in the immediate proximity of his welding were removed. Indeed, it appears to the Board that in the circumstances, the conduct involved may well have been deserving of an immediate disciplinary response.

17. However, no such disciplinary action was forthcoming from the employer. Aside from a somewhat perfunctory conversation with Boucher immediately after the fire, no member of management discussed the matter of the fire further with Sweetman. Moreover, it appears from the evidence that Sweetman was not removed from his work assignment but instead, continued disassembling the mezzanine stairs after the fire had been put out and the plant cleaned up. Otherwise, there is no evidence to suggest that Sweetman did anything but continue to perform his usual duties as a welder-fitter up to the time of his discharge on February 15.

18. According to Boucher, no disciplinary steps were taken in light of his view that the incident would likely lead to Sweetman's termination, notwithstanding his evidence that the actual decision to terminate Sweetman occurred several days later. Boucher stated that he believed that Sweetman's wrongdoing was obvious to him, and as a general rule, he does not like to "bark at people" when they know that they have done wrong. To similar effect was the rationale given by both Boucher and McBain as to why no reasons were given to Sweetman at the time of the announcement of the dismissal: they both testified that in their general view, informing an employee in this respect, of the reasons for a dismissal "only makes them feel worse" and that they acted out of the interests of preserving Sweetman's feelings and in reducing the possibility of conflict at the work place.

19. Both employer witnesses testified that the substantial decision to dismiss Sweetman was taken prior to the commencement of the organizing drive, during a production meeting between McBain and Boucher on January 29, 1993. It was their evidence that after reviewing production records, they decided to terminate the employment of two welder-fitters, including Sweetman, and to immediately hire three new employees to replace those let go. According to both McBain and Boucher, the plan made on January 29 involved the deferral of the actual termination of the employees until a later date and as a result, it was not necessary to advise the employees of their impending termination.

20. The evidence is undisputed that during the first week of February, three new welders were hired by the employer and commenced work at the plant. According to both Boucher and McBain, the dismissal of Sweetman on February 15 was merely in furtherance of their plan made prior to the commencement of the organizing drive. They testified that during a further production meeting on the afternoon of February 12, the decision was made to terminate Sweetman immediately. However, because it was a Friday, and because it was already late in the day, it was decided to advise Sweetman of his termination on the following Monday, February 15. As indicated above,

no reason was given for the termination at the time it was made, and Boucher declined to provide any reasons upon being requested to do so by Sweetman.

21. After carefully considering all of the circumstances in which the discharge occurred, the Board is not satisfied that the employer's decision to terminate Sweetman's employment was taken only for the reasons it advanced at the hearing, nor that the decision to do so was free from anti-union considerations. In the Board's view, the account advanced by the employer is not a credible or plausible explanation of the events. Of considerable significance in our assessment is the undisputed evidence that Sweetman received a substantial wage increase during the first week of the same month in which it is claimed the decision to terminate him was made. Even more significant is that the wage increase was related, at least in part, to the employer's perception of improvement in his production rates. Although the employer witnesses, especially Boucher attempted to minimize the significance of a 15% wage increase, the Board does not find this evidence to be persuasive. Both witnesses attempted to characterize the increase as an incentive for future good performance, rather than as a reward for increased past performance. However, it was McBain's evidence that Sweetman had significantly improved his performance during the previous four months. Although the employer witnesses also claimed that there was a significant deterioration in the quantity of Sweetman's performance, that evidence was left at the level of assertion. Although the employer purported to act on the basis of production records, no such records were adduced in evidence. Similarly, both witnesses alluded to a desire to prevent a continuing disparity in the wage grid that, they asserted could only be remedied by granting Sweetman a substantial wage increase. No reason was advanced why the wage grid situation had become problematical at precisely that time nor why, given the general rule that productivity is the basis for employees' wage rates, wage grid considerations were of such significance at that time to warrant a substantial wage increase.

22. In addition, the Board is not satisfied that the decision to terminate Sweetman was made prior to the commencement of any trade union activity at the plant, as claimed by the employer. In this respect, the employer's evidence is most unsatisfactory and, especially with respect to the meeting of January 29, 1993, the evidence of the two employer witnesses differs significantly. Most importantly, there was a discrepancy with respect to the actual reason for termination. Boucher made reference to allegedly poor fitting work on stock baskets he observed Sweetman perform during this time that, in his mind, was the basis for believing that Sweetman's improvement in performance was illusory. By contrast, McBain made no reference to the stock basket issue and indeed, his evidence does not disclose that it was even discussed at the meeting. According to McBain, the decision to let Sweetman go was made after his further review of production records that, he claimed, revealed a substantially lower rate of performance.

23. Similarly, the Board does not accept the employer witnesses' evidence that complaints regarding Sweetman's productivity were raised with him in both written and oral form as late as November, 1992. In this respect, we prefer the evidence of Sweetman, who denied any recollection of such a meeting and insisted that no warning letter was received by him with respect to his performance. We found his evidence to be credible, forthright, and more consonant with the probabilities than was the evidence of Boucher and McBain on this issue. Boucher admitted on a number of occasions to considerable difficulty in accurately recollecting dates, and during the course of his evidence was frequently unable to specify the time or sequence of the events at issue. Most importantly, the version of the facts advanced by the employer is by far less congruent with the facts than is the evidence of Sweetman. It is exceedingly unlikely that the employer would be approaching an employee to warn him of deficiencies in his job performance when, during that very time, the employee in question was experiencing a productivity increase that was sufficient to result in a substantial wage increase. We accept that, as a part of the normal supervisory duties that would be performed in these circumstances, Boucher may have instructed or advised Sweetman as to more

productive methods of performing his duties. Given his apparent difficulty in recollecting dates and sequences of events, it may be that in his evidence he confused the discussion he had with Sweetman in November 1992 with an earlier one. However, especially in light of any apparent reason to complain about Sweetman's rate of production in October or November of 1992, we find that the employer neither warned nor otherwise put Sweetman on notice that his performance was unsatisfactory in the several months prior to his discharge.

24. The Board also considers as most improbable the employer's explanation as to why the decision to terminate Sweetman was deferred, especially if the purported reason for the discharge included the setting of a fire at the plant. As indicated earlier, upon the fire being extinguished, Sweetman and Boucher had a most perfunctory conversation about the fire. Thereafter, no member of management ever addressed the issue with him, no further investigations of the incident were carried out, and Sweetman carried on his welding duties for three more weeks as if nothing had happened. As the employer quite correctly points out, Sweetman was responsible for the creation of an extremely hazardous situation. If it was indeed the intention of the employer at the time to respond to the setting of the fire, it is difficult to conceive of a more improbable response than one which involved a delay of three weeks. This delay in our view casts considerable doubt on the employer's claim that the termination was motivated even in part by the fire incident. Similarly, there appears to be little reason why, in light of the hiring of new welders, that there should be any requirement for Sweetman to continue to work, particularly, as was pointed out at the hearing, the overabundance of welders could lead to efficiency problems in the absence of a second shift. In this respect as well, the Board places little credence in the evidence of McBain that the termination of Sweetman prior to the recruitment and employment of new employees would make them feel "shaky".

25. Finally, the Board notes that the employer did not provide reasons upon the dismissal of Sweetman. Although not of itself indicative of wrongdoing, evidence was led that indicated that at least on several occasions, employees who had been dismissed were provided with reasons for their dismissal. In fact, Boucher himself was fired from Tate Andale in the fall of 1992, at which time he was provided with reasons. Especially with respect to the fire incident of January 25, the complaints that the employer alleged to be of their concern were easily identifiable and reducible to written reasons for termination. Moreover, we once again find that the reasons proffered for this omission as entirely implausible: both McBain and Boucher testified that the reason for refusing to provide reasons was in deference to Sweetman's feelings. McBain stated that he did not think that knowing why someone is fired would be generally helpful to them. In this respect as well, then, we find the irregular conduct of the employer in the course of the dismissal to be lacking in credible explanation.

26. In reviewing the evidence as a whole, then, we are not satisfied on a balance of probabilities that the employer's action in terminating Sweetman were entirely free from anti-union motives. The Board is prepared to infer from the juxtaposition of his trade union activity and the circumstances surrounding the termination that the decision to terminate Sweetman was taken at least in part as a response to his union activity. In this respect, the Board is mindful that no direct evidence of the employer's knowledge of the grievor's trade union activity was presented in evidence. We are satisfied that the circumstances of the discharge are such that the inference of knowledge can be readily drawn. Accordingly, the Board finds that in discharging Sweetman, the employer violated sections 65, 67 and 71 of the Act.

Discharge of Rod Cake

27. As noted, Cake was discharged from his employment on February 16, 1993 while in the

midst of his activities in the trade union organizing drive. The employer advances as the reason for dismissing him his failure to return a fan that he had misappropriated a month earlier. The thrust of the union's case, by contrast, was that the employer "resurrected" the matter and that the real basis of the discharge was a response to Cake's union activism.

28. On January 14, 1993, at the completion of his shift at approximately 3:30 p.m., Cake picked up the top part of a large disassembled electrical fan that had been left sitting in a cardboard bin in the plant for several weeks. The fan, which cost \$68 when it was new, had been used for several years in the plant. Although in need of significant repair, it was, in a basic sense, still usable. The evidence is undisputed that while picking up the fan, Cake glanced at and made eye-contact with Brian Boucher, who was observing the events, and then headed out the door with the fan. Nothing was said by either Boucher or Cake at the time. Boucher, it appears, assumed at the time that Cake had permission to take the fan, and upon discovering that that indeed was not the case, spoke with him about the incident the next morning.

29. At that time, Cake told him that he thought that the fan was refuse. Boucher advised him that it was not, that it was company property. Boucher then apprised McBain of the situation. McBain wrote out the following letter for Boucher, which was then given to Cake:

January 14, 1992

To: Rod Cake

You were found yesterday taking a fan from company premises.

I have accepted your explanation that you assumed that it was being disposed of, however it was still on the company premises and in good working order.

Please note that any item on company premises is the property of Tate Andale Canada Inc. and that removal of company property will not be tolerated.

Any further violation will result in your immediate dismissal.

TATE ANDALE CANADA INC

Brian Boucher
Shop Foreman

BM:pc

Copy: File

30. The employer sought to characterize this letter as a "final warning" that remained outstanding until the time of Cake's dismissal. However, upon receiving the letter, Cake immediately went to McBain's office in order to discuss the matter. Although much of the evidence was disputed in this respect, it is clear that a heated exchange ensued, in which Cake demanded that the letter be altogether removed from his file in light of the satisfactory explanation he had given for his actions. According to Cake, his view ultimately prevailed, and McBain agreed to remove the letter from his file unconditionally. Despite being aware that he was required to return the fan, Cake denies that he was ever spoken to further with respect to the matter after January 14. He states that because of this, and because of McBain's agreement to remove the discipline record from his file, he did not appreciate that there was any urgency concerning the matter and that he simply forgot to return it.

31. McBain, by contrast, denied agreeing to take the letter off the file at the meeting.

Rather, he testified that he agreed to take the letter off the file only on the express understanding that Cake return the fan, and that this remained his working assumption until his decision to terminate Cake. The thrust of his evidence was that the return of the fan was very much a live issue to him until the date of Cake's discharge. To that effect, he testified that at a meeting on February 2, 1993, he again reminded Cake that he was required to return the fan, although he admitted that he did not advise him of the consequences of the failure to return the fan. He testified further that, having given him over a month to make restitution, on February 16, 1993, the day after he had dismissed Sweetman, he simply determined that enough was enough and decided to terminate Cake on the spot.

32. Having reviewed the evidence in considerable detail, the Board is not satisfied that in light of all of the circumstances surrounding Cake's termination, the issue of Cake's return of the fan was the sole basis of Cake's discharge on February 16. McBain's evidence that he intended to remove the letter from the file only conditionally upon its return, and that the letter constituted a pending "final warning" is put into considerable doubt by the evidence of Brian Boucher. Boucher testified that he was requested to remove the letter from the file immediately upon seeing McBain exit from his meeting with Cake. Accordingly, to the extent that Cake's account of the January 14 meeting with McBain differs from the latter's account, we prefer Cake's. In our view, this significantly undermines McBain's claim that the incident, and more specifically, the return of the fan was taken as seriously at that time as McBain now claims.

33. Furthermore, the process by which the employer claims to have terminated Cake's employment does not support the inference that the non-return of the fan remained a live issue throughout the period between the meeting of January 14, 1993 and Cake's discharge on February 16, 1993. McBain testified that on the evening of February 15 (i.e., the day that Sweetman was terminated), while driving home from a meeting in London, he "realized that the fan incident still hadn't been resolved". According to McBain, at 7:00 of the next morning, when he arrived at the plant, the first thing he did was to instruct Boucher to enquire of Cake as to whether he had returned the fan. When Boucher returned several minutes later, they discussed the matter for a few moments, then decided to terminate Cake. The Board does not find this account of the decision to terminate Cake to be consistent with the claim that the return of the fan continued to be a live issue for the employer. The account proffered at the hearing does not explain why, if the fan issue had been alive, no earlier action was taken, in particular, during the production meeting of February 12, when both employer witnesses claim that Cake's termination was at issue. McBain testified that at the February 12 production meeting, at which Sweetman's termination was decided upon, Boucher also expressed concerns about Cake's performance and that he wanted him terminated as well. McBain testified that "he was not prepared to commit" to Cake's termination at that time. Instead, the decision to terminate Cake was made "because only on the 15th did I think more about the fan." The Board finds it difficult to understand that, if the non-return of the fan had been as live an issue as professed to be the case by the employer, why it was necessary for McBain to defer consideration of the effect it may have had upon his decision to terminate Cake. What is even more incongruous is that it was only on February 15 that he "realized" that some disciplinary action or at least an inquiry was not undertaken at that time. Thus, while the Board may doubt whether Cake had altogether forgotten the fan incident as he claims, we are satisfied that the situation had substantially receded in significance for McBain and that the issue was indeed being resurrected by him on February 16.

34. Moreover, we are not prepared to infer the absence of anti-union intention from the absence of direct evidence that the employer was aware of Cake's participation in the union drive. As indicated above, we are satisfied that given the circumstances of Heath Sweetman's termination, the employer had acted with knowledge of his participation in the union drive. We are pre-

pared to draw the same inference with respect to Rod Cake's termination. Especially when the evidence of "resurrection" is considered, the Board is unable to accept the employer's account of how and when it came to know of Cake's trade union activism. It is unnecessary to recount the complexities of this evidence in detail. It is sufficient to note that it would strain credulity to accept that McBain learned of the union drive from Boucher seconds after they had terminated Cake's employment, and that Boucher had simply neglected to earlier advise McBain of this fact.

35. In reviewing the evidence as a whole, the Board is not satisfied on a balance of probabilities that the employer's reasons for terminating Cake were free of anti-union motives. The Board infers from the termination in the context of trade union activity, from the conduct of the employer in resurrecting an issue that was over one month old in order to justify the termination, and from the absence of a plausible explanation of such conduct, that the decision to terminate Cake was taken at least in part as a response to his union activity. Once again, we are mindful that there is no direct evidence of employer knowledge of Cake's activities. Nevertheless, bearing in mind the harsh and unusual response of the employer, the otherwise notorious organizing role played by Cake and the entirely incredible account given by the employer as to when and how it came to know of the trade union drive, we are prepared to infer that the employer's response was with knowledge as to Cake's role in the organizing drive. Thus, having regard to the onus put upon the employer under section 91(5) of the Act and to the Board's well-known caselaw in this regard, we find that the employer violated sections 65, 67 and 71 of the *Labour Relations Act*.

36. In our decision of March 26, 1993, we therefore directed that both Sweetman and Cake be reinstated to their employment at Tate Andale on a permanent basis, and that the respondent pay them any lost wages or benefits together with interest in accordance with the Board's practice in this regard.

Reinstatement Issues

i) Work Assignments

37. As indicated above, the two grievors were reinstated on an interim basis on March 2, 1993, pursuant to the direction of a panel chaired by Alternate Chair MacDowell. The decision directed, with no further elaboration, that the grievors were to be reinstated pending the determination of the application on its merits. However, a dispute arose as to the adequacy of that reinstatement, particularly with respect to the assignment of duties and to the subsequent placement of the grievors on the afternoon shift. At the hearing, it was the position of the trade union that the employer's actions constituted a continuation of the unfair practices that gave rise to the original complaint; that the reinstatement was, further, a violation of section 82 of the Act; and, finally, that the employer's conduct was more generally, a breach of the terms of reinstatement. There was no substantial disagreement between the parties as to whether the reinstatement was required to be the "same job". However, especially given the flexibility of job assignments that had been the practice at the work place prior to the grievors' termination, argument was directed primarily toward the issue of whether, in fact, the grievors were so reinstated.

38. McBain first found out about the reinstatement order at approximately 4 p.m. on March 2, 1993. When both Sweetman and Cake arrived at work at 7:00 a.m. on the next day, the problem arose as to what work would be assigned to them. It was McBain's evidence that he advised Boucher, who is normally in charge of work assignments, to assign work to the grievors that "they had done before". It was the thrust of the evidence of both employer witnesses that that was the basis upon which the reinstatement in fact took place.

39. The work initially assigned to both grievors was the mechanical grinding down of

threads on water well screens that had been improperly fabricated by another company. In itself, this did not constitute welding work, although it was clear that a certain amount of grinding was an integral portion of preparation for welding work and was work that both Cake and Sweetman had done before. Nevertheless the work in question was amongst the most tedious and least desirable tasks normally performed by the grievors.

40. Approximately one hour into the day, Boucher assigned Cake to delivery duties. This work involved the delivery of parts to other fabricators and the picking up of parts and hardware at hardware stores. Although by no means a regular part of his job, Cake had in fact performed delivery duties previously, constituting as much as 10% of his work. The job was not particularly taxing, and indeed, Cake indicated that he considered it something of a preferred assignment. Nevertheless, the duties he was requested to perform kept him out of the plant for the remainder of the day.

41. It was Boucher's view that the initial job assignments were appropriate because both the grinding and the driving work constituted "work that they had done before". With respect to the grinding work, Boucher explained that the work was part of a work order that both Cake and Sweetman had previously worked on, albeit in their capacity as welder-fitters. In addition, Boucher testified without contradiction that other welders had been performing this work previously in the same manner. However, although the evidence on this point is not entirely free from doubt, it appears that the assignment of a welder to a full day of grinding work, although not unheard of, is relatively unusual. The more usual circumstance would be to have labourers perform a full day of grinding work.

42. In addition, the evidence is unchallenged that on that day, more desirable welding work was being performed by other welders, including one of the welders that were hired in early February. According to McBain, the reason that "actual" welding work was not assigned to Cake was because the work in question involved "TIG" welding, a welding method for which, he asserted, Cake was not certified. However, in cross-examination, McBain admitted that the newly hired employee also was not certified for the TIG welding method, and further, that Cake had performed TIG welding at the company in the past. In addition, a further reason that he did not want to assign the new employees to the grinding work was in deference to their feelings: he stated that he did not want to create "malice" as amongst them and that both he and Boucher wanted to make it as "fair and easy as they could". Finally, no evidence was led as to why, on that first day, Sweetman could not have been assigned to his usual function of fabricating stainless steel stock screens.

43. With respect to the driving duties, Boucher admitted that the assignment was unusual, inasmuch as the person normally doing the delivery work was present performing grinding duties, and that Cake would normally do driving functions only in his absence. Boucher stated that the reason for the assignment in this case was that the driver, who was a labourer, was doing a very good job grinding the screens and for that reason, he did not want to remove him from that position at the time.

44. Neither Sweetman nor Cake complained to the employer as to their assignments on the first day back at work; instead, at the conclusion of their duties that day they contacted the union. In turn, the union, by means of a rather heated exchange of facsimile correspondence through counsel, complained in no uncertain terms that the reinstatement measures were inappropriate. In response to this exchange, McBain advised Boucher to assign the two to welding tasks on the next day of work. Thus, when he reported to work on March 4, Sweetman was assigned to his regular job of fabricating stainless steel stock screens and there is no further complaint with respect to his job assignment. Cake, however, was assigned to the welding of support pads and anchors on the existing mezzanine structure. Although this was indeed welding work, the union asserts that the

job in question was still unsatisfactory inasmuch as the work consisted of the welding of painted carbon steel, as distinct from stainless steel. Considerable evidence which is unnecessary to review in any detail, was heard by the Board with respect to the relative virtues of carbon and stainless steel welding processes from the perspective of the welder. It is sufficient to note that while Cake did little or nothing to minimize the more unpleasant effects (such as heat, smoke or dust) of welding painted carbon steel, it is nonetheless clear that the work to which he was assigned was appreciably more unpleasant and less desirable than stainless steel welding, even if all reasonable precautions had been taken.

45. Once again, it was the employer's view that the carbon welding assignment was appropriate because it was work that Cake had performed previously. According to Boucher, Cake did as much as 25% of his work welding carbon steel. However, McBain's evidence differs on this point. According to him, Cake performed carbon welding only about 10% of the time. More significant than the difference in quantity is McBain's evidence that, for the most part, the carbon steel welding work that is required to be done is not painted, and therefore, less likely to create smoke, heat and dust. According to both Boucher and McBain, Cake was given the mezzanine assignment simply because the other welders were assigned to other welding jobs. However, it appears that little effort was made to find candidates other than Cake. Thus, in cross examination it was admitted by McBain that a new employee, who was assigned stainless steel welding duties could have been assigned to the mezzanine job, but that McBain had "no idea" whether or not that employee had the capability of welding carbon steel.

46. After carefully reviewing all the evidence concerning the duties assigned to the grievors, the Board is satisfied that the employer, in reinstating the two grievors, consistently assigned the less preferred assignments and therefore demonstrated a discriminatory pattern of treatment in which they were treated less favourably than other employees and in particular, newly-hired employees. The Board cannot accept the proposition, advanced by the employer, that the assignment of duties on a "done before" basis in itself constitutes a non-discriminatory basis for the allocation of duties in these circumstances. The evidence disclosed that while there was a substantial degree of flexibility in the range of assignments that both Sweetman and Cake would perform, nonetheless, there was a set of core duties that they performed more frequently than others, and to which they could be reasonably expected to be assigned upon returning to work. In our view, a "done before" approach to reinstatement, in which the overall mix of job functions normally performed is effectively ignored, is not indicative of a bona fide effort to reintegrate employees into the workforce.

47. The evidence is also clear that other employees, particularly newly hired employees, were performing more desirable welding work, and that by virtue of the assignments, the employer was expressing a clear preference in their favour. Moreover, the reasons advanced for the assignments are not in our view sufficiently cogent to convince us that they were not undertaken for improper motives. In particular, the Board finds the rationale for assigning the grievors the less preferable work (i.e not wishing to hurt the feelings of the newly hired employees) while appearing to ignore the grievors' preferences, to be tantamount to an admission of discrimination. Accordingly, bearing in mind the onus provisions of section 91(5) of the Act, and the Board's well-established jurisprudence in that respect, we find that in the course of reinstating the grievors to a job mix that was not reflective of the range of duties that they normally performed, the employer was in violation of section 67 of the Act.

ii) Assignments to Night Shift

48. On March 5, in response to further complaints from the union that the reinstatement of

Cake was unsatisfactory, the employer moved Cake to the position demanded by the union, the manufacture of custom stainless steel screens. On that same day, however, the employer made a decision to run a second afternoon shift commencing the following Monday, March 8 and that the two grievors were to be assigned to that shift. The trade union complains that the decision to place the two grievors on that shift were tainted by anti-union considerations and constituted an attempt to intimidate witnesses.

49. According to all the witnesses, the employer from time to time runs a second afternoon shift, which extends from 3:30 until midnight, in response to increases in the number of orders for its products. That second shift is normally staffed by four employees, usually three welders and a labourer. It appears that the use of a second shift allows for the more efficient use of the machinery, and as a result, work is accomplished more productively in this manner. It was McBain's evidence, which we accept, that during the week of March 5 the employer received a large number of orders which required the imposition of the second shift.

50. Considerable evidence was heard with respect to the employer's practice in assigning employees to afternoon shift assignments. It appears that, the employer's efforts notwithstanding, there is no particular system in place for the assignment of positions with the exception of a rough notion of rotation accompanied by considerable ad hocery.

51. Neither of the grievors were willing to go on the shift. However, neither of the two grievors had previously been assigned to that shift, and there was no evidence that they were ever asked to do so before March 5. The evidence is also clear that there was no operational reason preventing them from being put on that shift, and indeed, to the extent that there was a rotation in effect, their never having done such work placed them in increased jeopardy of that assignment. In that regard, a major reason advanced by the employer for placing the two grievors on the night shift was that their turn had come up. There was considerable dispute as to the thoroughness with which the employer conducted its assessment of the circumstances, and indeed, it appeared that McBain was not even aware at the time of his decision that Sweetman had never been assigned to the overtime shift. Nevertheless, there being no particular system in place for the allocation of the afternoon shift, the Board is not prepared to draw inferences of motive merely from the manner in which the rotation was handled.

52. However, other aspects of the process of putting the grievors on the night shift are more troubling. The two grievors, along with two other employees who were willing to go on the night shift were advised of their assignment in the afternoon of March 5. At the time, Boucher indicated to Sweetman that the assignment would be for an indefinite basis in that he would remain in that position until the work that he was doing ran out. This appears to be in clear violation of the company's policy in this respect. Boucher conceded that only in February, 1993, the employer had formulated a policy which placed a four week limit on assignments to the afternoon shift. No reason was advanced at the hearing as to why that policy would not be applied in the context of this assignment.

53. Further complicating the matter were the issues arising from the grievors' requirement to be present at proceedings at the Board related to the present complaint. Much was made of the grievor's failure to formally notify the employer that they would be required to attend the hearings, and that they would be unavailable for work for the coming week, during which time these proceedings were scheduled to commence. According to both employer witnesses, there were clear procedures for handling such matters as prearranged absences, and that the grievors simply failed to comply with them.

54. It was McBain's evidence that, in the light of such failure, and wishing to secure their

continued attendance at work, he assigned the grievors to the afternoon shift. No further attempt was made to clarify the situation with the grievors; in turn, the grievors did not approach the company to address the issue of their impending absence. There was no dispute from the union witnesses that no formal notification had been provided to the company. However, it was the evidence of Sweetman that, given their prominence in the pleadings, it did not "take a detective to figure it out" that they would be attending the hearing. In any event, Boucher testified that he knew of the absences in advance, given that he had read correspondence from the union to that effect, and because Rod Cake had mentioned it to him on March 5.

55. At the hearing, counsel for the employer forcefully argued that the placement of the two grievors on the afternoon shift in these circumstances was a sensible solution to a difficult problem, given that the obvious fact that the grievors could not be at two different places at the same time. Rather than being a violation of the grievors' rights to participation at the hearing, it was argued, the placement of them on the afternoon shift effectively secured that right. To ask the employer to do otherwise would place it in an impossible position.

56. There is no question that the result of the employer's action could, in certain circumstances, be a solution to the difficult problem alluded to by employer counsel. However, having reviewed the circumstances fully, we are not of the view that the solution reached was motivated entirely by such considerations. In particular, although we are in agreement with the employer that the matter of notification was handled by the grievors and the trade union with something less than the sensitivity to the legitimate interests of the employer than would reasonably be expected, we find the employer's reliance on the grievors' failure to provide formal notification as hollow and unconvincing, given that it knew or reasonably ought to have known that the grievors would have been attending the hearings and at the same time supporting its decision on the basis of this knowledge. In this respect, the employer appeared eager to seize upon a technicality in order to support its decision to assign Cake and Sweetman to the night shift. Moreover, we cannot accept, under the particular circumstances, that the unilateral placement of them onto the night shift could be contemplated as a rational response to the "problem" adverted to by counsel. In particular, we note that the work assignment, were it to be performed, would require them to attend proceedings at the Board, travel to work to the Concord, Ontario plant, presumably at the completion of the proceedings. They would then be required to perform work until approximately midnight. In the case of Sweetman, this would then be followed by a lengthy ride to his home in Bowmanville, Ontario. They would then be expected to attend at the hearing the following morning.

57. Notwithstanding the difficult situation that the employer was in, we cannot accept that McBain was in any manner interested in safeguarding the grievor's interests in making such an assignment, particularly since whatever consultation that was undertaken indicated that the grievors were unwilling to take the assignment. Nor is the Board prepared to accept that the employer was genuinely interested in safeguarding its own interests in having employees report for work under such extraordinary conditions. Especially bearing in mind the breach of the four week time limit for the assignment, it would appear to be much more likely that the employer acted out of a sense of frustration if not in a spirit of retribution and was in that sense, attaching a penalty to their attendance at the hearings. This is not to say that the assignment of them to the shift in itself was improper. Rather, we are saying that the manner and motivation in which the decision was taken was at least in part influenced by considerations that the grievors had participated and were to again participate in a proceeding under this Act. Accordingly, bearing in mind the provisions of section 91(5) of the Act and the Board's well-established jurisprudence related to it, we find that the employer, by assigning the two grievors to the night shift on March 8, 1993 acted in contravention of section 82 (1) of the Act.

58. Accordingly, the Board ordered that the employer return the grievors Cake and Sweetman to the day shift and that henceforth they be subject to night shift work in circumstances and conditions identical to those enjoyed by other employees of Tate Andale.

59. In the March 26, 1993 decision, we also directed the employer to post for 60 consecutive days in conspicuous places in the workplace the Notice to Employees attached thereto as Appendix "A", and to provide a copy of that notice to all employees affected by the union's certification application, Board File 3402-92-R.

60. Finally, in light of our findings that the employer's course of conduct in reinstating the grievors constituted violations of sections 67 and 82 of the *Labour Relations Act*, it is unnecessary for the Board to make a finding as to whether, or the extent to which the employer breached the reinstatement order as was argued by counsel for the applicant.

DECISION OF BOARD MEMBER R. W. PIRRIE; June 21, 1994

1. I dissent from the above decision as it relates to the issue of the grievors' reinstatement.

2. In the circumstances, I saw nothing wrong with the employer's actions in either the initial work assignments which would result in a violation of section 67, or in the subsequent assignments to the newly created night shift which would result in a violation of sections 67 and 82(1)

3730-93-R; 3731-93-R Canadian Union of Public Employees, Local 79, Applicant v. The Municipality of Metropolitan Toronto, Responding Party

Bargaining Unit - Certification - Combination of Bargaining Units - Security Guard - Union seeking to combine newly certified unit of security guards with pre-existing all-employee unit of municipality's employees - Parties requesting that Board first determine whether security guards monitor other employees so as to give rise to conflict of interest if included in those employees' bargaining unit - Board satisfied that monitoring of other employees by guards raising real possibility of conflict of interest if guards included in same bargaining unit - Application remitted back to parties

BEFORE: *Bram Herlich*, Vice-Chair, and Board Members *S. C. Laing* and *P. V. Grasso*.

APPEARANCES: *David McKee* and *Rudy Draxl* for the applicant; *Darrel Smith*, *Harold Ball*, *Kalli Chapman* and *Vince Quattrociocchi* for the responding party.

DECISION OF THE BOARD; June 15, 1994

1. The name of the responding party in these matters is hereby amended to read: "The Municipality of Metropolitan Toronto" (hereinafter referred to as "Metro" or the "employer").

2. In Board File 3730-93-R the applicant Canadian Union of Public Employees, Local 79 (also referred to as the "union") seeks to be certified to represent a bargaining unit described as "all security guards ..." (the parties having agreed on the bargaining unit description) which is composed of 17 Metro employees in the classification of security officer (hereinafter referred to as "SO"s). Pursuant to section 7 of the *Labour Relations Act*, the union has also applied, in Board

File 3731-93-R, to combine the bargaining unit it seeks with an existing bargaining unit which currently comprises some 6,000 Metro employees and which for the sake of clarity, if not absolute precision, will be referred to as the "full-time unit".

3. The parties met with a Labour Relations Officer prior to the hearing in these matters. Apart from issues related to the union's combination application, the parties were able to resolve all matters in the certification application and there is no dispute that the union is in a certifiable position in respect of the unit of SOs. Metro, however, resists the union's application to combine the 17 SOs into the full-time unit. Metro argues that although this application is brought under section 7 of the *Labour Relations Act*, the case will be determined by the application of section 6(6) of the Act. Section 7(3) outlines the factors the Board is to consider in determining a combination application and provides:

7.-...

(3) The Board may take into account such factors as it considers appropriate and shall consider the extent to which combining the bargaining units,

- (a) would facilitate viable and stable collective bargaining;
- (b) would reduce fragmentation of bargaining units; or
- (c) would cause serious labour relations problems.

Section 6(6) relates to the appropriateness of a bargaining unit consisting solely of security guards and provides:

6.-...

(6) A bargaining unit consisting solely of guards who monitor other employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining,

- (a) if the applicant trade union or the employer requests that the Board do so; and
- (b) if the Board is satisfied that the monitoring of other employees would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor.

4. Metro asserts that the monitoring performed by SOs of other employees would give rise to a conflict of interest if the SOs were included in the bargaining unit with the employees they monitor. The union disputes this claim. Metro further asserts that the determination of this question will be determinative of the union's combination application. While the union disagrees that determination of this issue will necessarily be dispositive of its combination application, it did not dispute that an assessment of the conflict of interest, if any, resulting from the inclusion of the SOs in the full-time unit is a central issue in the case. As a result, the parties agreed to jointly request that, prior to finally disposing of the matters before it, the Board hear evidence relevant to the duties and responsibilities of SOs and determine whether, to adapt the words of section 6(6), it is satisfied that the monitoring of other employees by SOs would give rise to a conflict of interest if the SOs were included in the bargaining unit with the employees they monitor. Having regard to the parties agreement and the Board's view that proceeding in this fashion was sensible and provided some potential economy, the Board proceeded on this basis. We note that the union's agreement to this manner of proceeding was without prejudice to its position that the Board's initial determination would not necessarily dispose of the matter or to its right to call further relevant evidence not directly related to the duties and responsibilities of SOs.

5. The evidence placed before the Board consisted primarily of the testimony of Vince Quattrociochi, the supervisor of security and reception at Metro Hall. His evidence was augmented by certain further facts and exhibits the parties agreed to put before us. Although the parties disagreed about certain characterizations and conclusions which should flow, the evidence before us was, in very large measure, undisputed. What follows is a brief summary of that evidence.

6. Metro Hall is the recently constructed corporate headquarters of the employer. Occupancy of the premises by Metro staff commenced in March of 1992 and was substantially completed by September of 1992 when the Metro councillors and Chair moved their offices into the facility. It is a twenty-seven story office tower. The first three floors, which include Metro Council Chambers and various meeting areas, were described as areas open to the public; the remaining 24 floors are occupied by Metro staff. There are some 2,200 Metro staff, approximately 1000 of whom are included in the full-time bargaining unit, who work at Metro Hall.

7. Mr. Quattrociochi oversees the security and life safety services provided at Metro Hall. This includes monitoring staff and visitors, insuring corporate property is properly secured and providing appropriate responses in cases involving medical, fire or other emergencies as well as instances of security breaches. Mr. Quattrociochi has 2 security forepersons who report to him. Below them in the reporting chain are the 17 full-time SOs who are the subject of the instant certification application; 7 casual SOs neither party sought to include in either the SO or full-time bargaining units; as well as 16 persons classified as secretary/receptionists who are included in the full-time bargaining unit.

8. The SOs' principal duties can be described as including monitoring Metro Hall and its surrounding grounds to insure security and life safety as well as conducting investigations and preparing reports of unusual or other circumstances warranting attention. For those purposes the SOs have access to a number of different security systems, some of which are extremely sophisticated and technologically advanced. For example, a card access system controls entry to the non-public areas of Metro Hall. Staff members are provided with personalized cards which are encoded with information permitting access to areas appropriate for the individual card holder. In this fashion not only is access to various areas controlled, but the movement and whereabouts of staff members is monitored and recorded. The computer system continuously generates a current record of uses of card access throughout the system. In addition SOs can enter queries on the system which will identify the last three card access uses by any selected staff member. Metro managers may make and have made requests to track the location of particular employees. The system can also generate a historical record of any particular employee's movement or the access of all staff to any particular location within any given time period, although SOs do not have direct access to these latter functions which will be performed at the request of SOs by their supervisors.

9. Also in place is a video surveillance system consisting of 47 cameras located throughout the facility. SOs can monitor these areas on the video monitors located at two central security positions. These cameras also provide recording functions generating archive tapes which may be consulted and used as evidence in the context of investigations by SOs. The SOs also have access to and will use, as necessary, a number of other monitoring and communication systems, including paging systems and radio transmissions; a system of 120 voice communication stations which provide voice access to two central security positions; the fire alarm control room and a communication system linked to elevators in the facility. SOs are also responsible for maintaining a registry recording the use and return by staff of keys to certain restricted areas and tool supplies.

10. SOs are generally assigned to perform one of a number of patrols during the course of

their shifts. These various patrols are, over time, rotated and shared equally among the SOs. Briefly, these patrols include foot patrols (SOs are required to monitor Metro Hall by checking in through the use of computer bar code stations located at some 100 positions throughout the facility) and assignment to the central control room or to the rotunda area (both of these areas, the rotunda area to a lesser degree, have access to various of the centralized monitoring and communication systems previously described). These three patrols are performed 24 hours a day and seven days a week. In addition SOs may be assigned to the security desk at the John Street entrance. From this post, which has no direct access to the camera or computer systems described, SOs monitor the entrance to the facility and are also responsible for co-ordinating all communication in the event of a fire; the facility's fire panel control room is adjacent to this desk. There is a further security post located on the 12th floor of Metro Hall which houses Metro's community services department and services welfare recipients. Finally, SOs can spend a small proportion of their time on duty at the staff parking booth insuring proper access and use of staff computer cards for the purpose of access to parking areas. There are other important functions SOs can perform but these are marginal both in terms of the relative amount of time involved and in respect of their relevance for our purposes. The vast majority of the SOs time (up to 95 percent) is spent performing the duties just briefly outlined.

11. SOs will be expected to fully report and document incidents which they discover or are reported to them. This may well include or follow the conduct of an investigation. For example, a staff member's complaint of an incident of theft may come to an SO's attention. The SO would take the complainant's information. Part of the SO's investigation might include determining, through use of the card access computer and/or review of archived video tape recordings, what employees had access to or were in the vicinity of the theft at the relevant times. Should such persons be identified, the SO could continue the investigation by seeking further information from those persons. An SO's investigation typically culminates in a special occurrence report ("SOR") which is shared with other SOs and forwarded to management for any appropriate further action. A sampling of the approximately 500 SORs prepared since the opening of the facility was filed as part of the evidence in this case. Those documents and the evidence of Mr. Quattrociocchi make it clear that SOs are not continuously occupied with detecting and investigating the suspected wrongdoings of Metro staff. On the other hand, over a period of roughly 14 months SOs have been involved in investigations or other handling of 21 reported thefts, 6 instances of unauthorized access, 14 occasions where individuals had to be escorted from the building, 9 reported cases of vandalism to property and a handful of other miscellaneous occurrences. Many of these instances did and any of them or other similar ones might require the investigation by SOs of Metro staff, including members of the full-time unit. Although SOs have yet to actually testify at an arbitration hearing involving the discipline of a full-time bargaining unit employee, there has been at least one occasion where such evidence was anticipated but ultimately rendered unnecessary when the parties settled the matter.

12. Prior to recent amendments to the Act, section 12 provided:

The Board shall not include in a bargaining unit with other employees a person employed as a guard to protect the property of an employer, and no trade union shall be certified as a bargaining agent for a bargaining unit of such guards and no employer or employers' organization shall be required to bargain with a trade union on behalf of any person who is a guard if, in either case, the trade union admits to membership or is chartered by, or is affiliated, directly or indirectly, with an organization that admits to membership persons other than guards.

13. As a result of recent amendments to the Act (S.O. 1992 c. 21), the former section 12 was repealed and section 6(6) was added. For ease of reference we set that section out again:

6.- ...

(6) A bargaining unit consisting solely of guards who monitor other employees shall be deemed by the Board to be a unit of employees appropriate for collective bargaining,

- (a) if the applicant trade union or the employer requests that the Board do so; and
- (b) if the Board is satisfied that the monitoring of other employees would give rise to a conflict of interest if the guards were included in a bargaining unit with the employees they monitor.

14. Both parties referred extensively to decisions of the Board, including *Geo. A. Crain & Sons Ltd.*, 63 CLLC paragraph 16,291; *Imperial Leaf Tobacco Company of Canada Limited*, [1969] OLRB Rep. Feb. 1168; *Wells Fargo Armoured Express, Ltd.*, [1972] OLRB Rep. Jan. 22; *Corby Distilleries Limited*, [1980] OLRB Rep. Feb. 194; *Metropol Security Limited*, [1980] OLRB Rep. Dec. 1755; *Wells Fargo Armcar, Inc.*, [1981] OLRB Rep. July 1046, application for judicial review dismissed (1982), 36 O.R. (2d) 361 (Div. Ct.); *United Security Limited*, [1982] OLRB Rep. Apr. 644; *Maplegrave Building Specialties Limited*, [1984] OLRB Rep. Apr. 635; and *Citicom Inc.*, [1985] OLRB Rep. Jan. 57. These cases dealt with the interpretation of the former section 12 and its predecessors. We were also referred to a number of decisions from other jurisdictions dealing with similar or related issues.

15. Although the previous Board decisions referred to concern consideration of a statutory provision since repealed, a review of those cases as well as the course of legislative change points to their utility in the instant matter. It is not necessary to review this jurisprudence in detail. Under the former section 12 there was an absolute prohibition on the inclusion of “a person employed as a guard to protect the property of an employer” in a bargaining unit with other employees. The legislation also placed restrictions on the ability of certain trade unions to represent guards. The term “guard”, however, was not defined in the legislation and it fell to the Board in a series of cases to interpret the meaning of the word. It was in this context that the Board developed and articulated what has been referred to as a conflict of interest test. In the *Corby* case (cited above) the Board offered the following at paragraph 2:

... While the section [then section 11] simply refers to “a person employed as a guard to protect the property of an employer”, this Board long ago determined that the term “guard” in the context of that section must be given a more restrictive meaning than might otherwise appear, being confined essentially to persons whose duties raise the real possibility of a conflict of interest with respect to fellow employees in a bargaining unit. It appears that the meaning of this provision was first considered by the Board in the case of *Geo. A. Crain & Sons Ltd.*, 63 CLLC para. 16,241. In finding the rationale for the provision in a decision which in fact pre-dated its enactment, the Board commented (at page 1208) that in that earlier case “... the character and degree of monitorial and admonitory authority exercised by the guards over the production workers were such that the Board was compelled to conclude that if both groups of employees were merged in a single bargaining unit the guards would be confronted with a serious conflict between their special responsibilities to their employer on the one hand, and their loyalty to fellow bargaining unit employees on the other.” The Board went on to add: “As it is only the special nature of a guard’s actual or potential relationship to other employees which can render him vulnerable to a conflict of loyalties, the principal characteristics which determine his status as a ‘guard’ within the meaning of the legislation, must somehow be connected with this relationship”.

16. This approach typifies the Board’s practice under the former section 12 (previously section 11). In the *Wells Fargo Armcar* case (cited above), the Board articulated its test as follows (at para. 16 and following):

16. Since the section fails to define the word "guard", it falls to the Board to do so. It is precisely for this purpose that the Board has used its conflict of interest test before deciding whether to apply the provisions of section 11. Since the effect of section 11 is to place limits on what constitutes an appropriate bargaining unit and on an employee's free choice of what trade union will represent him in collective bargaining, this test is a reasonable balancing of those restrictions with the need to protect an employer from the conflict posed by a guard's duty to protect that employer's property and any loyalty that the guard might feel towards other employees of the employer.

• • •

18. The test is whether duties of the persons who are claimed to be guards for purposes of section 11 raise the real possibility of a conflict of interest with respect to other employees of their employer....

17. There has, of course, been some alteration to the statutory scheme with the repeal of section 12 and the introduction of section 6(6). The most obvious change is that there are no longer any restrictions on the ability of trade unions to represent guards or, put in the language of the last quoted Board decision, the previous limits on an employee's free choice of what trade union will represent him in collective bargaining have been removed. This change could be seen to materially alter the balancing the Board previously performed between restrictions on collective bargaining and the conflict of interest which might obtain in respect of guards included in a bargaining unit with other employees. Absent any other change to the legislation, the Board might not feel compelled to give the same restrictive meaning to the word "guard" as it has in the jurisprudence just reviewed. The legislature has, however, made it unnecessary to determine this question. Section 6(6) has specifically adopted and codified the Board's conflict of interest test, making it clear that whatever restrictions remain in respect of guards and collective bargaining will apply only to guards whose monitoring of other employees would give rise to a conflict of interest. In this respect although the restrictions have been significantly altered, they would appear to apply to the same class of persons.

18. So as to be clear, the evidence before us does not suggest that improper, quasi-criminal or criminal conduct is rampant among full-time bargaining unit or other Metro employees. On the contrary. Consequently, it is clear that SOs do not spend the vast majority of their time investigating or otherwise dealing with such alleged conduct. On the other hand, and as is the case in any enterprise or in society at large, such conduct and incidents do occur from time to time and may require investigations culminating in the imposition of discipline on employees. It is clear that SOs can and do play a significant role in any such investigations. And while their responsibilities do not include the imposition of discipline, the results of their investigations may well have that effect and they may well be called upon, as a contemplated part of their duties, to provide evidence on behalf of the employer to justify the imposition of discipline. Having reviewed the evidence in the context of the Board's jurisprudence, we are satisfied that this is the kind of conflict of interest contemplated by the Board in its previous decisions and by the legislature in its recent amendments to the Act. In other words, we are satisfied that the monitoring of other employees by SOs raises the real possibility of a conflict of interest if the SOs were included in the full-time bargaining unit.

19. This, however, brings us to a consideration of a secondary argument advanced by the union which contended that section 6(6) cannot apply and neither can we respond affirmatively to the question posed by the parties unless we are satisfied that the conflict of interest would result *from the inclusion of the SOs in the full-time bargaining unit*. The parties did not dispute that, whatever result obtains in the combination application, the union, whether via a combined or separate bargaining unit, will be the bargaining agent representing the SOs for collective bargaining purposes. The union argues that there is no evidence suggesting any conflict of interest arises as a

result of the combined bargaining unit as opposed to arising merely because the SOs will be represented by the same union. Whatever conflict the statute may seem to attempt to eliminate, reduce or modify will continue to exist by virtue of the SOs being represented by the same union representing employees in the full-time bargaining unit.

20. While as a matter of statutory construction, there is an initial attraction to this argument, we are not persuaded that it ought to succeed. It is also true that there was little concrete evidence detailing any conflict of interest which might arise if the SOs are included in the full-time bargaining unit but would not arise if they were included in a separate bargaining unit and represented by the same union. None of this, however, detracts from the fact that we have concluded that there is real possibility of conflict of interest if the SOs were included in the full-time bargaining unit. The fact that the same conflict may exist even in the face of a different bargaining unit configuration does not alter that finding. We accept the employer's argument that a resulting complete elimination of any conflict of interest is not a prerequisite to the application of section 6(6). Rather, the legislature, in its wisdom, has determined that where a conflict of interest exists the appropriate response is not to limit a guard's selection of bargaining agent, but rather to simply deem a bargaining unit consisting solely of such guards to be appropriate for collective bargaining. It is not for the Board to determine in any particular case whether the resulting "guards only" unit will eliminate or seriously reduce the potential for conflict of interest.

21. Having regard to our findings and the agreement of the parties, these matters are remitted back to the parties for their further consideration. The parties are directed to advise the Registrar, within 30 days of the date hereof, as to how they wish to proceed in these matters.

COURT PROCEEDINGS

2526-89-G (Court File No. M12871) Ellis-Don Limited, Applicant v. The Ontario Labour Relations Board and International Brotherhood of Electrical Workers, Local 894, Respondents

Abandonment - Accreditation - Bargaining Rights - Collective Agreement - Construction Industry - Construction Industry Grievance - Employer Support - Judicial Review - Natural Justice - Whether respondent bound by provincial ICI agreement - 1962 working agreement signed by person with actual authority and not under duress - Board affirming and applying reasoning in *Nicholls-Radtke* case - Agreement valid at the time it was signed - Agreement not limited to six civil trades - Respondent's submission on employer support rejected - Union's withdrawal of 1980 grievance not giving rise to estoppel - Union's failure to include respondent on Schedule "F" in connection with 1975 accreditation of Electrical Contractors Association not signifying abandonment of bargaining rights - Respondent bound by provincial ICI agreement - Grievance allowed - Respondent applying for judicial review on ground that full Board meeting violated rules of natural justice and seeking interim relief - Motions Court judge granting order compelling attendance of chair, vice-chair and registrar before special examiner to obtain information respecting Board procedures - Motion to produce various reports and documents dismissed - Full panel of Divisional Court allowing appeal and setting aside order of motions court judge - Court of Appeal dismissing motion for leave to appeal

Board decision reported at [1992] OLRB Rep. Feb. 147. Motions court decision reported at [1992] OLRB Rep. July 885. Divisional Court decision reported at [1994] OLRB Rep. Jan. 113.

Court of Appeal for Ontario, Morden ACJO, Griffiths and Catzman JJ. A., June 13, 1994.

Morden ACJO (endorsement): Motion for leave to appeal dismissed with costs.

3780-93-R (Court File No. 303/94) Glazier Medical Centre, Applicant v. Ontario Nurses' Association and Ontario Labour Relations Board, Respondents

Bargaining Unit - Certification - Judicial Review - Practice and Procedure - Stay - Following participation in certification waiver programme and after agreeing on a number of issues related to union's certification application (including bargaining unit description), parties apparently agreeing to waive hearing - Legal identity of employer only issue apparently outstanding - Employer subsequently retaining new counsel, seeking to file additional materials and advising Board of its intention to attend officer meeting and Board hearing - Employer asking Board to find appropriate bargaining unit to be one other than that which had earlier been agreed to by the parties - Employer relying on fact that Waiver of Hearing Form A-5 not submitted for proposition that it had not agreed to waive hearing - Board not permitting employer to resile from agreement on bargaining unit - Board finding agreed-upon unit appropriate - Board indicating that it will consider employer request, if made, for hearing on question of legal identity of employer - Employer applying for judicial review on ground that Board declined jurisdiction to determine appropriate bargaining unit - Employer applying for stay pending judicial review - Stay application dismissed by Divisional Court

Board Decision reported at [1994] OLRB Rep. Mar. 249.

Ontario Court of Justice (Divisional Court), White J., June 16, 1994.

White J. (endorsement): This is an application for stay of a decision of OLRB dated 22 March/94 and decision and certification of April 27/94 whereby the O.N.A. was certified.

S.4 of the *Judicial Review Procedures Act* enables the court to stay these decisions and certification pending Judicial Review of same by the Divisional Court. The conditions relevant to granting a stay are:

- (1) the applicant for a stay must show on the merits a strong prima facie case
- (2) irreparable harm will befall the applicant should a stay be refused
- (3) the balance of convenience favours granting a stay

As to the merits the applicant says the O.L.R.B. did not grant a hearing, and failed to exercise its jurisdiction under s. 6.1 of the statute. The record of the Board's proceedings indicates on a prima facie basis that (1) the Board gave a hearing as the circumstances required and (2) the Board did exercise its jurisdiction under s. 6.1, albeit utilizing as a factor in exercising the discretion a policy which inhibits a party from resiling from an agreement pertaining to the bargaining unit.

Accordingly the applicant has failed to show a strong prima facie case as to the merits of the application for judicial review. Further the balance of convenience supports the orderly conduct of labour relations, included among which is that parties to collective bargaining will not resile from agreed positions. I see no irreparable harm to the applicant should a stay be refused.

Therefore, this application for a stay is dismissed.

The costs of this application are fixed at \$1,500.00 and the liability for those costs is reserved to the panel of the Divisional Court which hears the application for judicial review on its merits.

0013-90-JD (Court File No. 352/93) United Brotherhood of Carpenters and Joiners of America, Local 1256, Applicant v. Vic West Steel Limited, Ontario Sheet Metal Workers' and Roofers' Conference, Sheet Metal Workers International Association, Local 539 and Ontario Labour Relations Board

Adjournment - Construction Industry - Evidence - Judicial Review - Jurisdictional Dispute - Natural Justice - Practice and Procedure - Witness - Carpenters' and Sheet Metal Workers' unions disputing assignment of work in connection with handling, distribution, rigging, erection and installation of sheet metal siding onto wood - Board confirming assignment to members of Sheet Metal Workers' union - Board summarizing various evidentiary and procedural rulings made during lengthy proceeding - Board not allowing Carpenters' union to call area practice evidence to the extent that its materials had not been properly particularized - Board not permitting Sheet Metal Workers' union to call witness who had already once testified - Other than in reply, a party should not be permitted to recall a witness except in extraordinary circumstances - Carpenters' union moving to terminate proceedings after 10 days of hearing following settlement of its grievance (which constituted initial demand for work in dispute) - Motion to terminate proceedings dismissed - Board noting that jurisdictional dispute proceedings should not generally be terminated after hearing on the merits has begun where it is clear that jurisdictional dispute still exists - Carpenters' union applying for judicial review on grounds of alleged denial of natural justice - Divisional Court dismissing application with costs

Board decision reported at [1993] OLRB Rep. March 256.

Ontario Court Of Justice (Divisional Court), Southey, White and Dunnett JJ., June 1, 1994.

The Court (endorsement): The duty of the Board under s.104(13) of the *Labour Relations Act* to give full opportunity to the parties to any proceedings to present their evidence does not require the Board to sit and listen to all evidence that any party may choose to lead. To state the most obvious example, the Board may exclude evidence that is irrelevant or inadmissible.

In this case, the Carpenters' area practice evidence, which the Board declined to receive, would only have confirmed the existence of the situation indicated by the evidence of the Sheet Metal Workers. That situation was that members of both unions performed the work in dispute in Lambton County, generally in accordance with the particular predilection of the employer assigning the work. See paragraph 13 of the Board's decision of March 13, 1993. The evidence, therefore, would have added nothing to the determination of the matter in dispute. In those circumstance the Board, in our judgment, was entitled to decline to hear the evidence.

The application is dismissed.

Costs will follow the event. We fix the costs of the Conference and union at \$3,350, and the costs of the Company and Group at \$1,650. The Board does not ask for costs.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING MAY 1994

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3250-92-R: Independent Canadian Transit Union and its Local 6 (Applicant) v. Olympia & York Developments Limited (Respondent) v. United Brotherhood of Carpenters & Joiners of America, Local 93 (Intervener)

Unit: "all employees of Olympia & York Developments Limited at L'Esplanade Laurier, in the City of Ottawa, save and except supervisors, persons above the rank of supervisor, office staff, security guards, students employed during the school vacation period, and persons for whom any trade union held bargaining rights as of February 5, 1993" (9 employees in unit)

3141-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. M and K Grocery Corporation o/a LOEB Wycliffe Village (Respondent)

Unit: "all employees of M and K Grocery Corporation o/a LOEB Wycliffe Village in the Town of Richmond Hill, save and except Owner, Co-owner, Store Manager, Grocery Manager, Office Manager, and full-time Meat Department employees" (113 employees in unit) (*Having regard to the agreement of the parties*)

3242-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 995584 Ontario Ltd. c.o.b. as LOEB Club Plus Pembroke (Respondent) v. Group of Objecting Employees (Objectors)

Unit: "all employees of 995584 Ontario Ltd. c.o.b. as LOEB Club Plus Pembroke in the City of Pembroke, save and except Owner, Co-owner, Store Manager, Grocery Manager, Office Manager, Produce Manager and full-time Meat Department employees" (126 employees in unit) (*Having regard to the agreement of the parties*)

3297-93-R: United Food and Commercial Workers International Union, Local 633 (Applicant) v. 995584 Ontario Ltd. c.o.b. as LOEB Club Plus Pembroke (Respondent)

Unit: "all employees of 995584 Ontario Ltd. c.o.b. as LOEB Club Plus Pembroke employed in the Meat Department, save and except Owner, Co-owner, Store Manager, Meat Manager and persons regularly employed for not more than 24 hours per week" (5 employees in unit) (*Having regard to the agreement of the parties*)

3482-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. San-Wal Janitorial Ltd. (Respondent)

Unit: "all employees of San-Wal Janitorial Ltd. at George S. Henry Academy, 200 Graydonhall Drive, North York, save and except area supervisors and persons above the rank of area supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

3483-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. San-Wal Janitorial Ltd. (Respondent)

Unit: "all employees of San-Wal Janitorial Ltd. at Clarkson Secondary School, 2524 Bromsgrove Road, Mississauga, save and except area supervisors and persons above the rank of area supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

3659-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Township of Faraday (Respondent)

Unit: "all employees of The Corporation of the Township of Faraday in the Township of Faraday, save and except Road Superintendent and persons above the rank of Road Superintendent" (6 employees in unit)

3740-93-R: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America U.A.W. (Applicant) v. The Corporation of the Township of Dover (Respondent)

Unit: "all office employees of The Corporation of the Township of Dover in the City of Chatham, save and except Clerk Administrator and all those above the rank of Clerk Administrator, Treasurer, and Chief Building and Municipal Planning Official" (5 employees in unit)

3821-93-R: Canadian Association of Construction and Industrial Employees (Applicant) v. Jamesway General Contracting Incorporated (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers, or similar equipment and those primarily engaged in the repairing and maintenance of same and employees engaged as surveyors, carpenters and carpenters' apprentices, cement finishers and cement finishers' apprentices, and construction labourers employed by Jamesway General Contracting Incorporated in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township); the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton; the County of Grey; save and except non-working forepersons and persons above the rank of non-working foreperson" (16 employees in unit)

3850-93-R: Labourers' International Union of North America Local 1089 (Applicant) v. David Martin Enterprises (London) Limited o/a Martin Building Maintenance (Respondent)

Unit: "all employees of David Martin Enterprises (London) Limited o/a Martin Building Maintenance in the City of Sarnia, save and except non-working forepersons and persons above the rank of non-working foreperson" (38 employees in unit)

4163-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Sanitary Maintenance Systems (Respondent)

Unit: "all employees of Sanitary Maintenance Systems at 74 Victoria Street in the Municipality of Metropolitan Toronto, save and except supervisor persons above the rank of supervisor" (9 employees in unit)

4250-93-R: Labourers' International Union of North America, Local 527 (Applicant) v. Advance Cutting and Coring Ltd. (Respondent)

Unit: "all construction labourers in the employ of Advance Cutting and Coring Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Advance Cutting and Coring Ltd. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

4269-93-R: International Brotherhood of Electrical Workers (Applicant) v. Groff & Associates Ltd. (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Groff & Associates Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Groff & Associates Ltd. in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (11 employees in unit)

4300-93-R: International Brotherhood of Electrical Workers, Local Union 894 (Applicant) v. Nortec Electric (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Nortec Electric in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Nortec Electric in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

4321-93-R: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Honey Electric Limited (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Honey Electric Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Honey Electric Limited in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

4411-93-R: Canadian Union of Public Employees (Applicant) v. ReliaCARE Inc. (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity for ReliaCARE Inc. at its Riverside Health Care Centre situated at 6475 Wyandotte Street East in the City of Windsor, save and except Head Nurse, persons above the rank of Head Nurse and persons in bargaining units for which any trade union held bargaining rights as of March 23, 1994" (3 employees in unit) (*Having regard to the agreement of the parties*)

4440-93-R: United Food and Commercial Workers International Union (Applicant) v. 241 Pizza Ltd. (Respondent)

Unit: "all order processing and customer service employees of 241 Pizza Ltd. at 2000 Weston Road, Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff, marketing and quality control staff, computer maintenance staff, janitorial staff and security staff" (131 employees in unit) (*Having regard to the agreement of the parties*)

4445-93-R: United Steelworkers of America (Applicant) v. Canadian Wildlife Federation Inc. (Respondent)

Unit: "all employees of Canadian Wildlife Federation Inc. in the Regional Municipality of Ottawa-Carleton, save and except Supervisors, persons above the rank of Supervisor, Secretary to the Executive Vice-President and Secretary/Administrative Assistant to the General Manager" (65 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0029-94-R: International Brotherhood of Painters and Allied Trades Local Union 1819 (Applicant) v. The Window Place Incorporated (Respondent)

Unit: "all employees of The Window Place Incorporated in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (14 employees in unit) (*Having regard to the agreement of the parties*)

0040-94-R: International Brotherhood of Electrical Workers Local Union 115 (Applicant) v. Sydenham Sales and Service Limited c.o.b. Industrial Systems (Respondent)

Unit: "all electricians and electricians' apprentices in the employ of Sydenham Sales and Service Limited c.o.b. Industrial Systems in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of Sydenham Sales and Service Limited c.o.b. Industrial Systems in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville" (2 employees in unit)

0048-94-R: Service Employees Union International Union, Local 532 Affiliated with the A.F. of L., C.I.O., C.L.C. (Applicant) v. Guelph Rest Home Incorporated c.o.b. as Heritage House Retirement Home (Respondent)

Unit: "all employees of Guelph Rest Home Incorporated c.o.b. as Heritage House Retirement Home in the City of Guelph, save and except supervisors, persons above the rank of supervisor, registered nursing staff, program Director and office and clerical staff" (25 employees in unit)

0050-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Budget Car Rental Toronto Limited (Respondent)

Unit: "all employees of Budget Car Rental Toronto Limited employed at Pearson International Airport in the City of Mississauga, save and except supervisors, persons above the rank of supervisor, and any persons for whom any trade union held bargaining rights as of April 6, 1994" (54 employees in unit)

0059-94-R: United Brotherhood of Carpenters and Joiners of America, Local Union 1669 (Applicant) v. PCL Construction Eastern Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices, in the employ of PCL Constructors Eastern Inc. in the District of Rainy River, excluding the industrial, commercial and institutional sector, save and except non-working foremen, and persons above the rank of non-working foreman" (22 employees in unit)

0075-94-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at or out of 362 The East Mall and 175 and 205 Hilda Avenue in the Municipality of Metropolitan Toronto, and at or out of 25 Watline Drive and at Loblaws, 2150 Burnhamthorpe Road West, in the City of Mississauga, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (12 employees in unit) (*Having regard to the agreement of the parties*)

0079-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. The Corporation of the Town of New Tecumseth (Respondent)

Unit: "all employees of The Corporation of the Town of New Tecumseth in its Public Works Department in the Town of New Tecumseth, save and except supervisors, persons above the rank of supervisor, office, clerical staff, persons regularly employed for not more than 24 hours per week and students employed during the school vacation period" (22 employees in unit) (*Having regard to the agreement of the parties*)

0090-94-R: Labourers' International Union of North America Local 1089 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. at Shell Canada Sarnia Manufacturing Centre (Refinery), St. Clair Parkway, Moore Township, Corunna and Shell Chemical Plant, La Salle Road, Moore Township, Corunna, save and except forepersons, persons above the rank of foreperson, office, sales and clerical staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

0109-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. John Bear Pontiac Buick St. Catharines Ltd. (Respondent)

Unit: "all employees of John Bear Pontiac Buick St. Catharines Ltd. in the City of St. Catharines, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff, cashiers, mechanical co-ordinator, tower operator and service writers" (32 employees in unit) (*Having regard to the agreement of the parties*)

0146-94-R: United Steelworkers of America (Applicant) v. 366838 Ontario Limited c.o.b. as City Wide Taxi (Respondent)

Unit: "all employees of 366838 Ontario Limited c.o.b. as City Wide Taxi in the City of Oshawa, save and

except supervisors, persons above the rank of supervisor, office and clerical staff, Booking Agent and persons for whom any trade union held bargaining rights as of April 13, 1994" (11 employees in unit)

0150-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. MPW Industrial Services Ltd. (Respondent)

Unit: "all employees of MPW Industrial Services Ltd. working at Chrysler Canada Ltd., 2000 Williams Parkway, in the City of Brampton, save and except Business Manager, office, clerical and sales staff" (6 employees in unit) (*Having regard to the agreement of the parties*)

0162-94-R: Ontario Nurses' Association (Applicant) v. I.O.O.F. Senior Citizen Homes Inc. (Respondent)

Unit: "all registered and graduate nurses employed by I.O.O.F. Senior Citizen Homes Inc. at its Odd Fellow & Rebekah Home in the City of Barrie, save and except the Assistant Director of Resident Care and persons above the rank of Assistant Director of Resident Care" (11 employees in unit) (*Having regard to the agreement of the parties*)

0166-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. M.S. Maintenance Systems Inc. (Respondent)

Unit: "all employees of M.S. Maintenance Systems Inc. engaged in cleaning and maintenance at Sheppard Centre, 2 Sheppard Avenue East and 4881 Yonge Street, in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (23 employees in unit) (*Having regard to the agreement of the parties*)

0171-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Willow Manufacturing Co. Ltd. (Respondent)

Unit: "all employees of Willow Manufacturing Co. Ltd. in the Municipality of Metropolitan Toronto, save and except forepersons, persons above the rank of foreperson, office and sales staff" (18 employees in unit) (*Having regard to the agreement of the parties*)

0180-94-R: Ontario Nurses' Association (Applicant) v. The Kitchener-Waterloo Hospital (Respondent)

Unit: "all registered and graduate nurses employed in a nursing capacity by The Kitchener-Waterloo Hospital in the City of Kitchener, save and except Managers, persons above the rank of Manager, Program Coordinators, Occupational Health Team Coordinator and persons for whom any trade union held bargaining rights as of April 15, 1994" (639 employees in unit) (*Having regard to the agreement of the parties*)

0183-94-R: United Steelworkers of America (Applicant) v. Oshawa Holdings Ltd. (Respondent)

Unit: "all employees of Oshawa Holdings Ltd. at its Belmont Wholesale Produce Division in the City of Waterloo, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff" (38 employees in unit) (*Having regard to the agreement of the parties*)

0184-94-R: United Food and Commercial Workers International Union, AFL-CIO-CLC (Applicant) v. 645519 Ontario Limited c.o.b. as Cole's Your Independent Grocer (Respondent)

Unit: "all employees of 645519 Ontario Limited c.o.b. as Cole's Your Independent Grocer in the Town of Perth, save and except Store Manager, persons above the rank of Store Manager, Bookkeeper, Meat Manager, Deli Manager, Produce Manager and Head Cashier" (90 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0185-94-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 55 Elm Street West in the City of Mississauga, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (5 employees in unit) (*Having regard to the agreement of the parties*)

0187-94-R: Ontario Public Service Employees Union (Applicant) v. Lester B. Pearson Centre for Children & Youth (Respondent)

Unit: "all employees of Lester B. Pearson Centre for Children & Youth in the County of Kent, save and except supervisors and persons above the rank of supervisor" (27 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0206-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Zellers Inc. (Respondent)

Unit: "all employees of Zellers Inc. in the City of Cornwall, save and except supervisors/group merchandisers, persons above the rank of supervisor/group merchandiser, loss prevention officers, personnel clerks and students employed in a co-operative training program" (116 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0207-94-R: Windsor Newspaper Guild, Local 239, The Newspaper Guild (Applicant) v. The Windsor Star, A Division of Southam Inc. (Respondent)

Unit: "all employees of The Windsor Star, A Division of Southam Inc., in the Advertising Department, in the Province of Ontario, save and except supervisors, persons above the rank of supervisor and persons employed in a confidential capacity in matters relating to labour relations" (64 employees in unit) (*Having regard to the agreement of the parties*)

0222-94-R: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Ultrateck Electric Inc., 998229 Ontario Ltd. c.o.b. as Globe Electric (Respondents)

Unit: "all electricians and electricians' apprentices in the employ of 998229 Ontario Ltd. c.o.b. as Globe Electric and Ultrateck Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all electricians and electricians' apprentices in the employ of 998229 Ontario Ltd. c.o.b. as Globe Electric and Ultrateck Electric Inc. in all sectors of the construction industry in the Regional Municipality of Hamilton- Wentworth, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (13 employees in unit)

0223-94-R: United Food and Commercial Workers International Union (Applicant) v. Cuoco Foods Ltd. (Respondent)

Unit: "all employees of Cuoco Foods Ltd. in the City of Oshawa, save and except supervisors, persons above the rank of supervisor and office staff" (16 employees in unit) (*Having regard to the agreement of the parties*)

0250-94-R: International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of The United States and Canada, Local 800 (Applicant) v. Ed Mirvish Enterprises Limited operating as the Royal Alexandra Theatre (Respondent)

Unit: "all wig, make up and hair stylist employees of Ed Mirvish Enterprises Limited operating as the Royal Alexandra Theatre in the Municipality of Metropolitan Toronto, save and except the Production Director and persons above the rank of Production Director and persons for whom any trade union held bargaining rights as of April 22, 1994" (6 employees in unit) (*Having regard to the agreement of the parties*)

0251-94-R: United Food & Commercial Workers International Union (Applicant) v. Laidlaw Waste Systems Ltd. (Respondent)

Unit: "all employees of Laidlaw Waste Systems Ltd. working at or out of the City of Sudbury, save and except foremen, persons above the rank of foreman, industrial drivers, office, clerical and sales staff" (13 employees in unit) (*Having regard to the agreement of the parties*)

0253-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. 885028 Ontario Inc. o/a Accu-Bore Construction (Respondent)

Unit: "all employees of 885028 Ontario Inc. o/a Accu-Bore Construction engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, truck drivers and construction labourers, excluding the industrial, commercial and institutional sector of the construction industry, in the County of Simcoe and the District Municipality of Muskoka, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0256-94-R: Canadian Union of Professional Security-Guards (Applicant) v. Hamilton-Wentworth Protection Services (1991) Ltd. (Respondent)

Unit: "all employees of Hamilton-Wentworth Protection Services (1991) Ltd. employed as Security Guards in the Cities of Hamilton and Burlington, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor, at the following specific sites: 1. Victoria Park, 155 Queen Street North, Hamilton 2. Eatons, James Street North, Hamilton 3. Bronte Creek Provincial Park, Burloak Drive, Burlington 4. Federated Genco, 4480 Harvester Road, Burlington 5. Van Norman, 1380 Guelph Line, Burlington" (18 employees in unit) (*Having regard to the agreement of the parties*)

0258-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. K & Son Maintenance Co. Inc. (Respondent)

Unit: "all employees of K & Son Maintenance Co. Inc. employed at 25 and 55 St. Clair Avenue East in the Municipality of Metropolitan Toronto, save and except supervisor and persons above the rank of supervisor" (12 employees in unit) (*Having regard to the agreement of the parties*)

0279-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. 885028 Ontario Inc. (Respondent)

Unit: "all employees in the employ of 885028 Ontario Inc. engaged in the operation of cranes, shovels, bulldozers and similar equipment and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, truck drivers and construction labourers in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foreperson and persons above the rank of non-working foreperson" (4 employees in unit)

0280-94-R: United Food and Commercial Workers International Union (Applicant) v. Coca-Cola Bottling Ltd. (Respondent)

Unit: "all employees of Coca-Cola Bottling Ltd. in the City of Barrie, save and except supervisors, persons above the rank of supervisor, office and clerical staff, persons regularly employed for not more than 24 hours per week and persons employed during the school vacation period" (23 employees in unit) (*Having regard to the agreement of the parties*)

0281-94-R: Christian Labour Association of Canada (Applicant) v. Meadowvale Security Guard Services Inc. (Respondent)

Unit: "all employees of Meadowvale Security Guard Services Inc. employed at 6 Humberline Drive and 195 Rexleigh Drive in the Municipality of Metropolitan Toronto, save and except Patrol Supervisors and persons above the rank of Patrol Supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

0282-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Modern Building Cleaning Inc. (Respondent)

Unit: "all employees of Modern Building Cleaning Inc. engaged in building cleaning and maintenance, save and except supervisors, persons above the rank of supervisor, office and clerical staff at the following specific

locations: 1. Agincourt (Arena), 31 Glen Watford Drive; 2. Animal Control, 821 Progress Avenue; 3. Berner Trail C.C., 120 Berner Trail; 4. Birchmount Stadium, Birchmount Road; 5. Birkdale, 1299 Ellesmere Road; 6. Cedarbrook, 91 Eastpark Boulevard; 7. Cedar Ridge, 225 Confederation Drive; 8. Centennial (Arena), 1967 Ellesmere Road; 9. Clairlea, 45 Fairfax Crescent; 10. Commander Park (Arena), 140 Commander Boulevard; 11. Ellesmere Yard, 1050 Ellesmere; 12. Fire Hall, 740 Markham Road; 13. Goldhawk, 295 Alton Tower Circle; 14. Heron Park (Arena), 292 Manse Road; 15. L'Amoreaux C.R.C., 2000 McNicoll Avenue; 16. L'Amoreaux Sports Centre, 60 Silver Springs Boulevard; 17. L'Amoreaux Tennis Centre, 300 Silver Springs Boulevard; 18. Malvern (Arena), 30 Sewells Road; 19. McGregor Park (Arena), 2231 Lawrence Avenue East; 20. Mid-Scarborough (Arena), 2467 Eglinton Avenue East; 21. Nashden Yard, Nashden Road; 22. Oakridge, 63 Pharmacy Avenue; 23. Port Union, 5450 Lawrence Avenue East; 24. Scarborough (Arena), 75 Birchmount Road; 25. Scarborough Village Arena, 3600 Kingston Road; 26. Scott Westney House, 180 McLevin Avenue; 27. Stephen Leacock (Arena), 2500 Birchmount Road; 28. Stephen Leacock C.C., 2520 Birchmount Road; 29. Tall Pines, 64 Rylander Boulevard; 30. West Rouge, 270 Rouge Hill Drive, in the Municipality of Metropolitan Toronto" (77 employees in unit) (*Having regard to the agreement of the parties*)

0288-94-R: Graphic Communications International Union, Local 176-C, Hamilton (Applicant) v. The Hamilton Spectator, a division of Southam Inc. (Respondent)

Unit: "all employees of The Hamilton Spectator, a division of Southam Inc., in its Building Services Department, in the Cities of Hamilton and Burlington, save and except Assistant Supervisor and persons above the rank of Assistant Supervisor" (10 employees in unit) (*Having regard to the agreement of the parties*)

0292-94-R: Hotel Employees Restaurant Employees Union, Local 75 (Applicant) v. Fran Restaurants Limited (Respondent)

Unit: "all employees of Fran Restaurants Limited at 20 College Street West in the Municipality of Metropolitan Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (27 employees in unit) (*Having regard to the agreement of the parties*)

0305-94-R: Canadian Union of Public Employees (Applicant) v. Valley East Public Library Board (Respondent)

Unit: "all employees of the Valley East Public Library Board in the Village of Hanmer, save and except Head of Public Services and persons above the rank of Head of Public Services" (10 employees in unit) (*Having regard to the agreement of the parties*)

0307-94-R: The International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, Local 105 London, Ont. (Applicant) v. Orchestra London Canada Inc. (Respondent)

Unit: "all Production Staff of Orchestra London Canada Inc. in the City of London, including the Crew Chief, First Stagehand and casual labour hired as required, on an on call basis, save and except the Assistant to the Director of Operations and persons above the rank of Assistant to the Director of Operations" (2 employees in unit) (*Having regard to the agreement of the parties*)

0313-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. San-Wal Janitorial Ltd. (Respondent)

Unit: "all employees of San-Wal Janitorial Ltd. at Westview-Centennial Secondary School, 755 Oakdale Avenue in the Municipality of Metropolitan Toronto, save and except supervisors and persons above the rank of supervisor" (9 employees in unit) (*Having regard to the agreement of the parties*)

0315-94-R: Practical Nurses Federation of Ontario (Applicant) v. Victorian Order of Nurses - Waterloo Region Branch (Respondent)

Unit: "all registered and graduate practical nurses employed in a nursing capacity at the Victorian Order of Nurses - Waterloo Region Branch, in the Regional Municipality of Waterloo, save and except Manager-Clini-

cians, persons above the rank of Manager-Clinician, office and clerical staff” (35 employees in unit) (*Having regard to the agreement of the parties*)

0330-94-R: Ontario Nurses’ Association (Applicant) v. Sunnycrest Nursing Homes Limited (Respondent)

Unit: “all registered and graduate nurses employed in a nursing capacity at Sunnycrest Nursing Homes Limited in the Town of Whitby, save and except the Director of Nursing and persons above the rank of Director of Nursing” (14 employees in unit) (*Having regard to the agreement of the parties*)

0332-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. San-Wal Janitorial Ltd. (Respondent)

Unit: “all employees of San-Wal Janitorial Ltd. at Mayfield Secondary School Rural Route Number 4 (Mayfield Road) in the Region of Peel, save and except supervisors and persons above the rank of supervisor” (5 employees in unit) (*Having regard to the agreement of the parties*)

0334-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Wheelabrator EOS Canada Inc. (Rupke Division) (Respondent)

Unit: “all employees of Wheelabrator EOS Canada Inc. (Rupke Division) working at Chrysler Canada Ltd., 2000 Williams Parkway in the City of Brampton, save and except supervisors, persons above the rank of supervisor, office and sales staff” (8 employees in unit) (*Having regard to the agreement of the parties*)

0336-94-R: International Brotherhood of Painters and Allied Trades Local Union 1891 (Applicant) v. Goldcrest Interior Contractors Inc. (Respondent)

Unit: “all journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets, or drywall tapers, plasterers or fireproofing applicators in the employ of Goldcrest Interior Contractors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice painters, employees engaged in the laying of resilient tiles, ceramic tiles, hardwood tiles, sheet goods, linoleum or carpets, or drywall tapers, plasterers or fireproofing applicators in the employ of Goldcrest Interior Contractors Inc. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (2 employees in unit) (*Clarity Note*)

0337-94-R: Communications, Energy & Paperworkers Union of Canada (CEP) (Applicant) v. Niagara Paper Co. Ltd. (Respondent)

Unit: “all employees of Niagara Paper Co. Ltd. in the Regional Municipality of Niagara, save and except Managers, persons above the rank of Manager and clerical staff” (27 employees in unit) (*Having regard to the agreement of the parties*)

0348-94-R: Service Employees Union, Local 210 (Applicant) v. Goderich Place Retirement Residence (Respondent)

Unit: “all employees of Goderich Place Retirement Residence in the Town of Goderich, save and except Supervisors, persons above the rank of Supervisor and Confidential Office Manager” (10 employees in unit) (*Having regard to the agreement of the parties*)

0399-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Wendell Farquhar Trucking Limited (Respondent)

Unit: “all employees of Wendell Farquhar Trucking Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario engaged in the operation of cranes, shovels, bulldozers, and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, and all employees of Wendell Farquhar Trucking Limited in all sectors of

the construction industry in that portion of the District of Algoma south of the 49th parallel of latitude, excluding the industrial, commercial and institutional sector, engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

0405-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. San-Wal Janitorial Ltd. (Respondent)

Unit: "all employees of San-Wal Janitorial Ltd. at Britannia Campus, 100 Elm Drive West, in the City of Mississauga, save and except supervisors and persons above the rank of supervisor" (2 employees in unit) (*Having regard to the agreement of the parties*)

0406-94-R: Labourers' International Union of North America, Local 183 (Applicant) v. Adelaide Maintenance Limited (Respondent)

Unit: "all employees of Adelaide Maintenance Limited, janitorial service at 252 Bloor Street West, Toronto, save and except supervisors, persons above the rank of supervisor, office and clerical staff" (14 employees in unit) (*Having regard to the agreement of the parties*) (*Clarity Note*)

0410-94-R: International Union of Operating Engineers, Local 793 (Applicant) v. Construction G. Di Iorio Inc. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Construction G. Di Iorio Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of Construction G. Di Iorio Inc. in all sectors of the construction industry in the Regional Municipality of Ottawa-Carleton, and the United Counties of Prescott and Russell, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0434-94-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. San-Wal Janitorial Ltd. (Respondent)

Unit: "all employees of San-Wal Janitorial Ltd. at North Peel Secondary School, 1305 Williams Parkway in the City of Brampton, save and except supervisors and persons above the rank of supervisor" (4 employees in unit) (*Having regard to the agreement of the parties*)

0448-94-R: Canadian Security Union (Applicant) v. Hi-Tec Security & Investigations (Respondent)

Unit: "all Security Officers in the employ of Hi-Tec Security & Investigations in the City of Sault Ste. Marie, save and except supervisors and persons above the rank of supervisor" (20 employees in unit) (*Having regard to the agreement of the parties*)

0451-94-R: Labourers' International Union of North America, Local 837 (Applicant) v. Hurley Corporation (Respondent)

Unit: "all employees of Hurley Corporation employed at the Centre Mall situated at 1227 Barton Street East in the City of Hamilton, save and except one working foreperson and persons above the rank of one working foreperson" (11 employees in unit) (*Having regard to the agreement of the parties*)

0475-94-R: Labourers' International Union of North America, Local 247 (Applicant) v. Spada Tile (Belleville) Ltd. (Respondent)

Unit: "all construction labourers in the employ of Spada Tile (Belleville) Limited in all sectors of the construction industry in the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the

United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (4 employees in unit)

0482-94-R: International Ladies Garment Workers Union (Applicant) v. Bigi Canada Ltd. (Respondent)

Unit: “all employees of Bigi Canada Ltd. at the Square One Shopping Centre, in the City of Mississauga, save and except Assistant Store Managers and persons above the rank of Assistant Store Manager” (11 employees in unit) (*Having regard to the agreement of the parties*)

0493-94-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Go Plastics Inc. (Respondent)

Unit: “all employees of Go Plastics Inc. in the City of Kitchener, in the Regional Municipality of Waterloo, save and except forepersons, persons above the rank of foreperson, office and sales staff, students, engineering and design, laboratory and silk screen departments” (29 employees in unit) (*Having regard to the agreement of the parties*)

0504-94-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Harry Sherman Crowe Housing Co-Operative Inc. (Respondent)

Unit: “all employees of Harry Sherman Crowe Housing Co-operative Inc. in the Municipality of Metropolitan Toronto, save and except the Board of Directors” (3 employees in unit) (*Having regard to the agreement of the parties*)

0513-94-R: United Steelworkers of America (Applicant) v. Woodstock 401 Service Centre Inc. (Respondent)

Unit: “all employees of Woodstock 401 Service Centre Inc. located in the Township of Southwest Oxford, save and except Assistant Managers and persons above the rank of Assistant Manager” (17 employees in unit)

0515-94-R: Labourers’ International Union of North America, Local 837 (Applicant) v. Hurley Corporation (Respondent)

Unit: “all employees of Hurley Corporation employed at Hamilton Eaton Centre situated at York Boulevard and James Street in the City of Hamilton, save and except one working foreperson and persons above the rank of one working foreperson” (10 employees in unit) (*Having regard to the agreement of the parties*)

Bargaining Agents Certified Subsequent to a Pre-Hearing Vote

0948-93-R: IWA - Canada (Applicant) v. 795651 Ontario Inc. o/a Le Nord (Respondent)

Unit: “tous les employés de 795651 Ontario Inc. faisant affaires sous la raison sociale LE NORD à Hearst et à Kapuskasing à l’exception du gérant à Hearst, le rédacteur en chef, la secrétaire au gérant et comptable et le livreur des journaux” (11 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	12
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	7
Number of segregated ballots cast by persons whose names appear on voter’s list	4
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	4

3281-93-R: United Food and Commercial Workers International Union (Applicant) v. K-W Food Services, A Division of Argcen Inc. (Respondent) v. Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Locals 414, 422, 440, 448, 461, 483, 488, 1000, and 1688 (Intervener)

Unit: “all employees of K-W Food Services, A Division of Argcen Inc. at Kitchener-Waterloo, Ontario, save

and except office and sales staff, supervisor, and persons above the rank of supervisor” (69 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	74
Number of persons who cast ballots	61
Number of ballots marked in favour of applicant	58
Number of ballots marked in favour of intervener	3

4447-93-R: International Association of Heat and Frost Insulators and Asbestos Workers Local 95 (Applicant) v. Tomco Insulation Ltd. (Respondent)

Unit: “all journeymen and apprentice insulators and asbestos workers in the employ of Tomco Insulation Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all journeymen and apprentice insulators and asbestos workers in the employ of Tomco Insulation Ltd. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman” (5 employees in unit)

Number of names of persons on revised voters’ list	5
Number of persons who cast ballots	5
Number of ballots marked in favour of applicant	5
Number of ballots marked in favour of intervener	0

0004-94-R: Independent Paperworkers of Canada (Applicant) v. Avenor Inc. (Respondent) v. Communications, Energy and Paperworkers Union of Canada and its Local 343 (Intervener)

Unit: “all employees of Avenor Inc. in the Township of Markham, save and except foremen, persons above the rank of foreman, office and sales staff and students employed during the school vacation period” (86 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	100
Number of persons who cast ballots	82
Number of ballots excluding segregated ballots cast by persons whose names appear on voter’s list	82
Number of ballots marked in favour of applicant	80
Number of ballots marked in favour of intervener	2

0005-94-R: Independent Paperworkers of Canada (Applicant) v. Avenor Inc. (Respondent) v. Communications, Energy and Paperworkers Union of Canada and its Local 949 (Intervener)

Unit: “all employees of Avenor Inc. at Burlington, save and except foremen, persons above the rank of foreman, office staff and security guards” (130 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters’ list	130
Number of persons who cast ballots	116
Number of segregated ballots cast by persons whose names do not appear on voters’ list	1
Number of spoiled ballots	2
Number of ballots marked in favour of applicant	105
Number of ballots marked in favour of intervener	9

Bargaining Agents Certified Subsequent to a Post-Hearing Vote

3063-93-R: Canadian Union of Public Employees (Applicant) v. The Children’s Aid Society of the County of Bruce Inc. (Respondent)

Unit: “all employees of The Children’s Aid Society of the County of Bruce Inc., in the County of Bruce, regularly employed for not more than 24 hours per week and students employed during the school vacation

period, save and except Supervisors, persons above the rank of Supervisor, Executive Secretary, Manager of Business and Finance and persons for whom any trade union held bargaining rights as of December 1, 1993" (7 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	3
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	1

4132-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (Applicant) v. Active Mold Plastic Products Ltd. (Respondent)

Unit: "all employees of Active Mold Plastic Products Ltd. in the Town of Oldcastle, save and except managers, persons above the rank of manager, office, clerical, technical and sales staff" (50 employees in unit)

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	43
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	21

4290-93-R: Teamsters Local Union No. 879 (Applicant) v. Tandet Nationalease Ltd. (Respondent)

Unit: "all employees of Tandet Nationalease Ltd. in the City of Hamilton, save and except supervisors and persons above the rank of supervisor" (6 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2

0014-94-R: United Steelworkers of America (Applicant) v. Metro Taxi Ltd. c.o.b. as Capital Taxi (Respondent) v. Group of Employees (Objectors)

Unit: "all employees of Metro Taxi Ltd. c.o.b. as Capital Taxi operating as taxi owners and/or taxi drivers in the Cities of Ottawa, Vanier and Gloucester, save and except supervisors, dispatchers, telephone staff, multi car/multi plate owners, persons above the rank of supervisor and office and clerical staff" (129 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	134
Number of persons who cast ballots	129
Number of ballots marked in favour of applicant	72
Number of ballots marked against applicant	55
Number of ballots segregated and not counted	2

0018-94-R: Communications, Energy & Paperworkers Union of Canada (Applicant) v. Wells Fargo Alarm Services of Canada Limited (Respondent) v. International Brotherhood of Electrical Workers, Local 636 (Intervener)

Unit: "all employees in the single bargaining unit of Wells Fargo Alarm Services of Canada Limited and Pony Express Residential Ltd., save and except foremen, persons above the rank of foreman and office staff" (58 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	59
Number of persons who cast ballots	47
Number of ballots marked in favour of applicant	42
Number of ballots marked in favour of intervener	5

Applications for Certification Dismissed Without Vote

3958-93-R: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Canac Kitchens Limited (Respondent)

3963-93-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. Tilden Car Rental Inc. (Respondent)

Applications for Certification Dismissed Subsequent to a Pre-Hearing Vote

0070-94-R: International Union of Operating Engineers Local 796 (Applicant) v. Black & McDonald Limited (Respondent) v. Local 787, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada (Intervener)

Unit #1: "all Tradesmen, Maintenance Mechanics and Operators in the employ of Black & McDonald Limited performing work of an operation and maintenance nature at the following projects: 1) Canadian Imperial Bank of Commerce Commerce Court Toronto, Ontario 2) Nestle Enterprises Limited 1185 Eglinton Avenue East Don Mills, Ontario 3) North American Life Centre 5650 Yonge Street North York, Ontario 4) Citadel Assurance 1075 Bay Street Toronto, Ontario 5) Lockheed Air Terminal of Canada Pearson International Airport Toronto, Ontario 6) Canadian Pacific P.O. Box 190 Malton, Ontario 7) Canadian Imperial Bank of Commerce Waterpark Place 20 Bay Street Toronto, Ontario 8) Bank of Montreal 4100 Gordon Baker Road Willowdale, Ontario 9) Canadian Imperial Bank of Commerce 1320 Denison Street Markham, Ontario 10) Canadian Imperial Bank of Commerce 1855 Minnesota Court Mississauga, Ontario 11) Park Home Management 5 Park Home Avenue North York, Ontario 12) Hewlett Packard 5150 Spectrum Parkway Mississauga, Ontario 13) Lawrence Heights Community Health Centre Inc. 12 Flemington Road Toronto, Ontario M6A 2N4 14) Arkell Research Station Ministry of Agriculture and Food Arkell, Ontario 15) Metropolitan Separate School Board 80 Sheppard Avenue East North York M2N 6E8" (76 employees in unit) (*Clarity Note*)

Number of names of persons on revised voters' list	74
Number of persons who cast ballots	67
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	67
Number of ballots marked in favour of applicant	33
Number of ballots marked in favour of intervener	34

Applications for Certification Dismissed Subsequent to a Post-Hearing Vote

1194-91-R: International Union of Bricklayers and Allied Craftsmen, Local 2, Ontario (Applicant) v. Parkview Construction Corp. (Respondent) v. Labourers' International Union of North America, Local 183 (Intervener) v. Group of Employees (Objectors)

Unit 1: "all bricklayers and bricklayers' apprentices in the employ of Parkview Construction Corp. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all bricklayers and bricklayers' apprentices in the employ of Parkview Construction Corp. in all other sectors in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, save and except non-working foremen and persons above the rank of non-working foreman." (5 employees in unit)

Unit 2: "all construction labourers in the employ of Parkview Construction Corp. in all sectors of the construction industry in the Municipality of Metropolitan Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquering and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

0984-93-R: International Union of Operating Engineers, Local 793 (Applicant) v. MJR Contractors Ltd. (Respondent)

Unit: "all employees of MJR Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all employees MJR Contractors Ltd. in all other sectors in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Haldimand engaged in the operation of cranes, shovels, bulldozers and similar equipment, and those primarily engaged in the repairing and maintaining of same, and all employees engaged as surveyors, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	4
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2

3365-93-R: International Union, United Plant Guard Workers of America (Applicant) v. Barnes Security Services Ltd. c.o.b. as Metropol Security (Respondent)

Unit: "all security guards employed by Barnes Security Services Ltd. c.o.b. as Metropol Security in the City of Trenton, save and except site supervisors and persons above the rank of site supervisor, dispatchers, office, clerical and sales staff, students employed during the school vacation period, persons employed at the General Electric work location and persons in bargaining units for which any trade union held bargaining rights as of December 23, 1993" (4 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2

4154-93-R: Teamsters Local Union 938 (Applicant) v. Northern Allied Supply Company Limited (Respondent)

Unit: "all employees of Northern Allied Supply Company Limited in the City of Timmins, save and except supervisors, persons above the rank of supervisor and office and sales staff" (23 employees in unit) (*Having regard to the agreement of the parties*)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	23
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	18

Applications for Certification Withdrawn

3695-93-R: Teamsters Local Union No. 419 (Applicant) v. Safety-Kleen Canada Inc. (Respondent)

4086-93-R: United Brotherhood of Carpenters and Joiners of America, Local 1988 (Applicant) v. Du-For Scaffolding (Respondent)

4113-93-R: Sheet Metal Workers International Association, Local Union 285 (Applicant) v. Centair Systems Limited and/or 954848 Ontario Limited c.o.b. as Centair Systems (Respondents) v. Ontario Sheet Metal Workers' & Roofers' Conference and Sheet Metal Workers' International Association, Local 30 (Intervener)

4140-93-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. The Governing Council of the University of Toronto (Respondent)

4145-93-R: International Beverage Dispensers' & Bartenders' Union, Local 280 of the Hotel & Restaurant Employees' & Bartenders' International Union (Applicant) v. Genosha Hotel (Oshawa) (Respondent)

4171-93-R: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent) v. Group of Employees (Objectors)

0032-94-R: International Brotherhood of Painters & Allied Trades, Local 1795 (Applicant) v. BDO Dunwoody Ward Mallette Inc. (Respondent)

0190-94-R: Canadian Security Union (Applicant) v. Hi-Tec Security & Investigations (Respondent) v. Group of Employees (Objectors)

0191-94-R: Canadian Security Union (Applicant) v. Hi-Tec Security & Investigations (Respondent) v. Group of Employees (Objectors)

0192-94-R: Canadian Security Union (Applicant) v. Hi-Tec Security & Investigations (Respondent) v. Group of Employees (Objectors)

0293-94-R: Canadian Security Union (Applicant) v. Hi-Tec Security & Investigations (Respondent)

0351-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Public Utilities Commission of the Corporation of the Town of Fort Frances (Respondent) v. Local Union 1744, International Brotherhood of Electrical Workers (Intervener)

0352-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. Hydro-Electric Commission of the Town of Dryden (Respondent) v. Local Union 1730, International Brotherhood of Electrical Workers (Intervener)

0354-94-R: Power Workers' Union, CUPE Local 1000 (Applicant) v. The Kenora Hydro Electric Commission (Respondent) v. Local Union 559, International Brotherhood of Electrical Workers (Intervener)

0401-94-R: Christian Labour Association of Canada (Applicant) v. Lifestyle Retirement Communities (Respondent)

0404-94-R: Teamsters Local Union No. 879 (Applicant) v. A. Cupido Transport Limited (Respondent)

0416-94-R: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Intercon Security Limited (Respondent)

0422-94-R: Canadian Union of Public Employees (Applicant) v. Corporation of the Town of Lindsay (Respondent)

0633-94-R: United Food and Commercial Workers International Union (Applicant) v. 241 Pizza Ltd. (Respondent)

APPLICATION FOR COMBINATION OF BARGAINING UNITS

3249-92-R: Independent Canadian Transit Union and its Local 6 (Applicant) v. Olympia & York Developments Limited (Respondent) (*Granted*)

3676-93-R: United Food Processors Union, Local 483, Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. Best Foods Canada Inc. and Casco Inc. (Respondents) (*Withdrawn*)

4252-93-R: Victorian Order of Nurses Windsor-Essex County Branch (Applicant) v. Canadian Union of Public Employees (Respondent) (*Withdrawn*)

0289-94-R: Graphic Communications International Union, Local 176-C, Hamilton (Applicant) v. The Hamilton Spectator, a division of Southam Inc. (Respondent) (*Granted*)

0483-94-R: International Ladies Garment Workers Union (Applicant) v. Bigi Canada Ltd. (Respondent) (*Granted*)

FIRST AGREEMENT - DIRECTION

0211-94-FC: Brewery, General and Professional Workers' Union (Applicant) v. Flexmaster Canada Limited c.o.b. as Uni-Flex Hose (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

2522-92-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eli's Electric Service, Town and Country Electric Ltd., Town and County Electric; Steeles Electric; E & E Steeles Electric Ltd. c.o.b. as E & E Steeles Electric c.o.b. as Steeles Electric (Respondent) (*Granted*)

3435-93-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Pelbro Dry-wall Co. Ltd., 836200 Ontario Inc., Lorden Contracting Inc. (Respondents) (*Endorsed Settlement*)

3675-93-R: United Food Processors Union, Local 483, Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Applicant) v. Best Foods Canada Inc. and Casco Inc. (Respondents) (*Withdrawn*)

3816-93-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647 (Applicant) v. Neilson Dairy, a division of William Neilson Ltd./Ltee, Tibbett & Britten Group Canada Inc., Freshlink Canada Ltd. (Respondents) (*Endorsed Settlement*)

3901-93-R: Labourers' International Union of North America, Ontario Provincial District Council and Local 493 (Applicant) v. Des'Build Development Ltd. and Niroc Construction Ltd. and Rochefort Construction Limited and/or Rochefort Construction (1982) Limited (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervener) (*Endorsed Settlement*)

4006-93-R: IBEW Construction Council of Ontario, International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Carling Electric Inc., K2 Contracting Inc., Enersave Lighting Ottawa, Kantec Electric Inc. (Respondents) (*Withdrawn*)

4371-93-R: Retail Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America, Local 414 (Applicant) v. The UCS Group/Division of Imasco Retail Inc. Respondent) (*Withdrawn*)

0345-94-R: Sheet Metal Workers' International Association, Local Union #285 (Applicant) v. Centair Mechanical Company a division of 954848 Ontario Limited, 954848 Ontario Limited c.o.b. as Centair Mechanical Company, Centair Systems Limited and 954848 Ontario Limited c.o.b. as Centair Systems (Respondents) (*Endorsed Settlement*)

SALE OF A BUSINESS

2522-92-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eli's Electric Service, Town and Country Electric Ltd., Town and County Electric; Steeles Electric; E & E Steeles Electric Ltd. c.o.b. as E & E Steeles Electric c.o.b. as Steeles Electric (Respondent) (*Granted*)

3435-93-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Pelbro Dry-wall Co. Ltd., 836200 Ontario Inc., Lorden Contracting Inc. (Respondents) (*Endorsed Settlement*)

3816-93-R: Milk and Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local Union 647 (Applicant) v. Neilson Dairy, a division of William Neilson Ltd./Ltee, Tibbett & Britten Group Canada Inc., Freshlink Canada Ltd. (Respondents) (*Endorsed Settlement*)

3901-93-R: Labourers' International Union of North America, Ontario Provincial District Council and Local 493 (Applicant) v. Des'Build Development Ltd. and Niroc Construction Ltd. and Rochefort Construction Limited and/or Rochefort Construction (1982) Limited (Respondents) v. United Brotherhood of Carpenters and Joiners of America, Local 2486 (Intervener) (*Endorsed Settlement*)

3936-93-R: United Textile Workers of America (Applicant) v. Fortune Footwear, Division of Susan Shoe Industries Limited (Sonatex) (Respondent) (*Dismissed*)

4006-93-R: IBEW Construction Council of Ontario, International Brotherhood of Electrical Workers, Local 586 (Applicant) v. Carling Electric Inc., K2 Contracting Inc., Enersave Lighting Ottawa, Kantec Electric Inc. (Respondents) (*Withdrawn*)

0176-94-R: International Brotherhood of Electrical Workers, Local 402 (Applicant) v. Donald S. Rajala c.o.b. as The Wireman/and or David Donald Rajala c.o.b. as Rajala Electric (Respondents) (*Endorsed Settlement*)

0345-94-R: Sheet Metal Workers' International Association, Local Union #285 (Applicant) v. Centair Mechanical Company a division of 954848 Ontario Limited, 954848 Ontario Limited c.o.b. as Centair Mechanical Company, Centair Systems Limited and 954848 Ontario Limited c.o.b. as Centair Systems (Respondents) (*Endorsed Settlement*)

SECTION 64.2 - SUCCESSOR RIGHTS/CONTRACT SERVICES

4350-93-R: Intercon Security Limited (Applicant) v. United Steelworkers of America (Respondent) v. Barnes Security Services Ltd. c.o.b. as Metropol Security (Intervener) (*Withdrawn*)

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

4373-93-R: Bruce D. Richer/ Shawn K. Morgan (Applicant) v. Graphic Communications International Union Local 500 M (Respondent) v. Richer Graphics Ltd. (Intervener)

Unit: "all lithograph employees of Richer Graphics Limited involved in production of litho plates film and artwork in the Town of Dundas" (2 employees in unit) (*Granted*)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	2
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2

4437-93-R: Karen Denoble - on behalf of the staff at the Purple Rooster (Applicant) v. Hotel and Restaurant Employees and Bartenders Union, Local 604 (Respondent) v. The Purple Rooster Inc. (Intervener) (*Withdrawn*)

0058-94-R: Maple Lodge Farms Ltd. Garage Workers (Applicant) v. United Food & Commercial Workers International Union, Local 175, AFL-CIO-CLC (Respondent) v. Maple Lodge Farms Ltd. (Intervener) (*Withdrawn*)

0135-94-R: Donald Freestone (Applicant) v. Local 280 of the International Beverage Dispensers' & Bartenders' Union of the Hotel and Restaurant Employees' and Bartenders' International Union, A.F. of L., C.I.O., C.L.C. (Respondent) v. Ulster Arms Tavern (Intervener)

Unit: "all full-time and part-time male and female employees employed in the beverage departments in the licensed establishment hereto as tapmen, bartenders, beverage waiters, (including the waiters who operate automatic beer dispensers or other automatic dispensing equipment), bar boys and improvers and any other new classification relating to the service of alcoholic beverages" (2 employees in unit) (*Granted*)

0528-94-R: Cathy Aker Paul McGill Nancy Scarrow (Applicant) v. Ontario Public Service Employees Union (Respondent) v. Ontario Swine Improvement Inc. (Intervener) (*Withdrawn*)

0613-94-R: Master Tube Manufacturing (1993) Ltd. (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) (Respondent) (*Granted*)

0621-94-R: The Operational Management Group of The Guelph Correctional Centre, Representative: Z. Ronkai (Applicant) v. David Cristofferson Minister of Solicitor General & Corrections (Respondent) (*Dismissed*)

REFERRAL FROM MINISTER (SECTION 109)

3846-93-M: International Union of Operating Engineers, Local 793 (Applicant) v. Guild Electric Limited (Respondent) (*Withdrawn*)

3971-93-M: International Union of Bricklayers and Allied Craftsmen, Local 2 (Applicant) v. Starline Masonry Limited (Respondent) (*Withdrawn*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

0616-94-U: Marriott Management Services (Applicant) v. Canadian Union of Public Employees and its Local 229 Linda Dumbleton, Bruce Dodds and John Platt (Respondent) (*Endorsed Settlement*)

0398-94-U: Victor Carquez (Applicant) v. Canadian Union of Public Employees and its Local 229 (Respondent) v. Marriott Management Services (Intervener) (*Dismissed*)

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE (CONSTRUCTION INDUSTRY)

0454-94-U: Country Meadow Estates No. 2 Inc. (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 46 and Vince McNeil (Respondent) (*Withdrawn*)

0669-94-U: Interior Systems Contractors Association of Ontario (Applicant) v. Drywall Acoustic Lathing and Insulation Union, Local 675, Gus Simone and Claudio Mazzotto (Respondent) (*Withdrawn*)

APPLICATIONS CONCERNING REPLACEMENT WORKERS

4399-93-M: Pinkerton's of Canada Limited (Applicant) v. CAW/Canada (Respondent) (*Withdrawn*)

4400-93-M: Pinkerton's of Canada Limited (Applicant) v. CAW/Canada (Respondent) (*Withdrawn*)

4401-93-M: Pinkerton's of Canada Limited (Applicant) v. CAW/Canada (Respondent) (*Withdrawn*)

4402-93-M: Pinkerton's of Canada Limited (Applicant) v. CAW/Canada (Respondent) (*Withdrawn*)

4403-93-M: Pinkerton's of Canada Limited (Applicant) v. CAW/Canada (Respondent) (*Withdrawn*)

4404-93-M: Pinkerton's of Canada Limited (Applicant) v. CAW/Canada (Respondent) (*Withdrawn*)

4405-93-M: Pinkerton's of Canada Limited (Applicant) v. CAW/Canada (Respondent) (*Withdrawn*)

4406-93-M: Pinkerton's of Canada Limited (Applicant) v. CAW/Canada (Respondent) (*Withdrawn*)

4407-93-M: Pinkerton's of Canada Limited (Applicant) v. CAW/Canada (Respondent) (*Withdrawn*)

0227-94-U: Canadian Union of Public Employees and its Local 229 (Applicant) v. Marriott Management Services (Respondent) (*Granted*)

0265-94-U: London and District Service Workers Union, Local 220 (Applicant) v. Kettle Creek Gardens (Retirement Home) a Division of 904122 Ontario Ltd. (Respondent) (*Endorsed Settlement*)

0413-94-M: Kettle Creek Gardens (Retirement Home) a Division of 904122 Ontario Ltd. (Applicant) v. London & District Service Workers Union Local 220 (Respondent) (*Endorsed Settlement*)

0590-94-U: Canadian Union of Public Employees and its Local 3190 (Applicant) v. Marriott Management Services - Bell Northern Research (Respondent) (*Endorsed Settlement*)

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0899-92-U: Jose Martins (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) (*Dismissed*)

2836-93-U: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Belmont Plastering (Respondent) (*Endorsed Settlement*)

2909-93-U: Rheal V. Dionne, Norton Smith, Robert Taylor, Robert Hastie, John A. MacDonald Robert Burgon, and 91 persons listed on Appendix "A" (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) and its Local 199 (St. Catharines) and its Local 1973 (Windsor) (Respondent) v. General Motors of Canada Limited (Intervener) (*Dismissed*)

3006-93-U: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Ontario Store Fixtures Inc. (Respondent) (*Withdrawn*)

3315-93-U: Daniel Adusei and Felicia Adusei (Applicant) v. Ontario Nurses' Association (Respondent) v. Clarke Institute of Psychiatry (Intervener) (*Dismissed*)

3367-93-U: Kevin Ward (Applicant) v. David Chapman's Ice Cream Limited (Respondent) (*Withdrawn*)

3405-93-U: Labourers' International Union of North America, Local 527 (Applicant) v. Umacs of Canada Inc. (Respondent) (*Withdrawn*)

3607-93-U: Milk and Bread Drivers, Dairy Employees Caterers and Allied Employees, Local Union No. 647 (Applicant) v. Neilson Dairy, a division of William Neilson Ltd./Ltee (Respondent) (*Withdrawn*)

3694-93-U: Teamsters Local Union No. 419 (Applicant) v. Safety-Kleen Canada Inc. (Respondent) (*Endorsed Settlement*)

3893-93-U; 3894-93-U: Angello Malamas (Applicant) v. Chestnut Park Hotel, Union Local 75 (Respondents); Angello Malamas (Applicant) v. Chestnut Park Hotel, Mr. David K. Nielsen (Respondents) (*Dismissed*)

3957-93-U; 4062-93-U; 4220-93-U; 0012-94-U: United Brotherhood of Carpenters and Joiners of America, Local 1072 (Applicant) v. Canac Kitchens Limited (Respondent) (*Dismissed*)

4001-93-U: United Food and Commercial Workers Local Unions 175 and 633 (Applicant) v. Barnsdale Markets (James St. I.G.A.) (Respondent) (*Withdrawn*)

4028-93-U: William Michael Toth (Applicant) v. United Bro. of Carpenters & Joiners of America Loc. 27 (Respondent) (*Withdrawn*)

4035-93-U; 4177-93-U: Casco Inc. (Applicant) v. United Food Processors Union, Local 483, Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Respondent); Best Foods Canada Inc. (Applicant) v. United Food Processors Union, Local 483, Retail, Wholesale Canada, Canadian Service Sector Division of the United Steelworkers of America (Respondent) (*Withdrawn*)

4119-93-U: John Welsh (Applicant) v. Local 707 National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada), Ford Motor Company of Canada, Limited (Respondents) (*Withdrawn*)

4152-93-U: Havel Green (Applicant) v. Sign and Pictorial Painters Local 1630 of the International Brotherhood of Painters and Allied Trades (Respondent) v. Daytech Mfg. Ltd. (Intervener) (*Withdrawn*)

4153-93-U: Ibrahim Kamara (Applicant) v. International Brotherhood of Painters and Allied Trades Local 1630 (Respondent) (*Withdrawn*)

4161-93-U: United Food and Commercial Workers International Union Locals 175 and 633 (Applicant) v. K & Son Maintenance Co. Inc. (Respondent) (*Terminated*)

4179-93-U; 4180-93-U: Michael John Hasted (Applicant) v. Russel Drummond Division of Fedmet Inc. (Respondent) v. United Steelworkers of America (Intervener); Michael John Hasted (Applicant) v. United Steelworkers of America (Respondent) (*Withdrawn*)

4242-93-U: Nancy Bishop (Applicant) v. Ontario Liquor Board Employees' Union (Respondent) v. The Liquor Control Board of Ontario (Intervener) (*Withdrawn*)

4263-93-U: United Food and Commercial Workers International Union, Locals 175 and 633 (Applicant) v. Caressant Care Retirement Home (Respondent) (*Withdrawn*)

4332-93-U: Ontario Public Service Employees Union (Applicant) v. Cambrian College of Applied Arts and Technology (Respondent) (*Dismissed*)

4336-93-U: International Brotherhood of Electrical Workers, Local Union 894 (Applicant) v. Nortec Electric (Respondent) (*Withdrawn*)

4339-93-U: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Cambareri Construction Inc. and Rocco Cambareri (Respondents) (*Endorsed Settlement*)

4397-93-U: Borai Abdelrahman (Applicant) v. Union Local 75, Delta Chelsea Inn - Management (Respondents) (*Terminated*)

4469-93-U: Nabil S. A. Abdelrahman (Applicant) v. Hotel Employees Restaurant Employees Union Local 75 (Respondent) v. Delta Chelsea Inn (Intervener) (*Terminated*)

4494-93-U: David Liebenow (Applicant) v. Crown Cork & Seal (Respondent) (*Dismissed*)

4505-93-U: The Ontario Public Service Employees Union and its Local 455 (Applicant) v. Hastings and Prince Edward Legal Services (Respondent) (*Withdrawn*)

4511-93-U; 0235-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Reynolds-Lemmerz Industries (Respondent); Reynolds-Lemmerz

Industries (Applicant) v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Respondent) (*Withdrawn*)

4520-93-U: The Canadian Union of Public Employees and its Locals 942 and 1976 (Applicant) v. The Royal Ottawa Health Care Group (Respondent) (*Withdrawn*)

4524-93-U: Sylvie Deslieres (Applicant) v. Ontario Public Service Employees Union (Respondent) (*Withdrawn*)

4525-93-U: Office and Professional Employees International Union Local 343 (Applicant) v. Workers Health and Safety Centre (Respondent) (*Withdrawn*)

0015-94-U: International Association of Machinists and Aerospace Workers Local Lodge 989 (Applicant) v. Irvin Industries Canada Ltd. (Respondent) (*Withdrawn*)

0037-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Trilake Timber Company (1992) Limited and George Herbacz (Respondent) (*Withdrawn*)

0073-94-U: Linda MacDonald (Applicant) v. C.U.P.E. #1022 (Respondent) (*Withdrawn*)

0076-94-U: Christian Labour Association of Canada (Applicant) v. Lifestyles Retirement Communities (Beechwood Place and Court) (Respondent) (*Withdrawn*)

0092-94-U: Theo Kirthapongalam Mini Bar Room Service Delta Chelsea (Applicant) v. Hotel Employees Restaurant Employees Union, Local 75, (Respondent) (*Withdrawn*)

0108-94-U: Charles David McKay (Applicant) v. C.A.W., Local 1986, Butler Metal Products (Respondents) (*Withdrawn*)

0122-94-U; 0477-94-U: Service Employees Union, Local 210 (Applicant) v. 2883 Howard Avenue Inc. o/a Towne & Country Motel (Respondent); Service Employees' Union, Local 210 (Applicant) v. 1073478 Ontario Limited o/a Towne & Country Motel (Respondent) (*Withdrawn*)

0151-94-U: Giuseppe Marrelli (Applicant) v. Jacuzzi Canada (Respondent) (*Withdrawn*)

0155-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Tytrek Graphic Finishers Inc. (Respondent) (*Withdrawn*)

0156-94-U: Michael Robert Wells (Applicant) v. Ontario Public Service Employees Union O.P.S.E.U. (Respondent) (*Withdrawn*)

0169-94-U: Jill Youde, Connie Vandervies, Lynda Jean, Shirley Taylor, Betty Sharpe (Applicant) v. Labourers' International Union of North America, Local 1089 Mr. Robert Leone-business manager (Respondent) (*Withdrawn*)

0195-94-U: Ontario Nurses' Association (Applicant) v. Pleasant Rest Nursing Home Ltd. (Respondent) v. United Steelworkers of America (Intervener) (*Withdrawn*)

0199-94-U: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Ultrateck Electric Inc., 998229 Ontario Ltd., c.o.b. as Globe Electric (Respondents) (*Withdrawn*)

0201-94-U: Madelene Alagano, Catalina Alvarez, Elizabeth Araujo, Eleen Buckley, Suzanna Cabral and Susan Chislett (Applicants) v. Miniworld Management, operating as North York Infant Nursery and Pre-school (Respondent) (*Withdrawn*)

0210-94-U: Brewery, General and Professional Workers' Union (Applicant) v. Flexmaster Canada Limited c.o.b. as Uni-Flex Hose (Respondent) (*Withdrawn*)

0213-94-U: Communications Energy & Paperworkers Union Local 914 (Applicant) v. Welland Chemical Ltd. (Respondent) (*Withdrawn*)

0244-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Champlain Energies Limited (Respondent) (*Withdrawn*)

0249-94-U: Southern Ontario Newspaper Guild, Local 87, The Newspaper Guild, (CLC, AFL-CIO) (Applicant) v. Thomson Newspapers Company Limited (Respondent) (*Withdrawn*)

0259-94-U: International Association of Machinists and Aerospace Workers, Local Lodge 2243 (Applicant) v. Kop-Flex Canada, Limited (Respondent) (*Withdrawn*)

0284-94-U: Silveer Maes (Applicant) v. Bundy of Canada (Division of John Crane Canada, Inc.) (Respondent) (*Withdrawn*)

0291-94-U: International Union, United Automobile, Aerospace & Agricultural Implement Workers of America - U.A.W. (Applicant) v. The Corporation of the Township of Dover (Respondent) (*Withdrawn*)

0304-94-U: United Steelworkers of America (Applicant) v. Alros Products Limited (Respondent) (*Withdrawn*)

0327-94-U: Jan Thomas Bos (Applicant) v. I B E W Electrical Workers Local 1687 (Respondent) (*Dismissed*)

0329-94-U: National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada) (Applicant) v. Windo-Motion (Atoma Glass Systems) (Respondent) (*Withdrawn*)

0346-94-U: Sheet Metal Workers' International Association, Local Union 285 (Applicant) v. Centair Mechanical Company a division of 954848 Ontario Limited, 954848 Ontario Limited c.o.b. as Centair Mechanical Company, Centair Systems Limited and 954848 Ontario Limited c.o.b. as Centair Systems (Respondents) (*Endorsed Settlement*)

0361-94-U: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Champlain Energies Limited (Respondent) (*Withdrawn*)

0363-94-U: Office and Professional Employees' International Union, Local 343 (Applicant) v. Ombudsman Ontario (Respondent) (*Withdrawn*)

0390-94-U: Susan Bauer (Applicant) v. Y.U.S.A. (York University Staff Association) (Respondent) (*Dismissed*)

0394-94-U: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Honey Electric Limited (Respondent) (*Withdrawn*)

0435-94-U: Labourers' International Union of North America, Local 247 (Applicant) v. Grange W. Elliott Limited (Respondent) (*Withdrawn*)

0456-94-U: United Food and Commercial Workers International Union, Locals 175 and 633 (Applicant) v. CUOCO Food Services Ltd. (Respondent) (*Withdrawn*)

0458-94-U: Valerie Gaynor (Applicant) v. Danny Serbin (Respondent) (*Dismissed*)

0459-94-U: Valerie Gaynor (Applicant) v. Bill Gillette (Respondent) (*Dismissed*)

0486-94-U: Joanna Marcelle Lawrence (Applicant) v. Transportation & Communications Union and Canadian Pacific Express and Transport (Respondents) (*Dismissed*)

0509-94-U: International Brotherhood of Electrical Workers Construction Council of Ontario International

Brotherhood of Electrical Workers, Local 586 (Applicant) v. Drycore Electric Ltd. (Respondent) (*Withdrawn*)

0592-94-U: Chet Ross (Applicant) v. Tectrol Employee Association (Respondent) (*Dismissed*)

0601-94-U: Patrick Doyle (Applicant) v. Loomis Courier Service (Respondent) (*Withdrawn*)

0604-94-U: Hans Prosegger (Applicant) v. Local 46 (Respondent) (*Dismissed*)

0632-94-U: United Food and Commercial Workers International Union (Applicant) v. 241 Pizza Ltd. and Clyde Viola (Respondent) (*Withdrawn*)

0649-94-U: Deian Yankov Marinov (Applicant) v. Autobahn Fine Cards Inc. (Respondent) (*Dismissed*)

APPLICATION FOR INTERIM ORDER

0303-94-M: United Steelworkers of America (Applicant) v. Alros Products Limited (Respondent) (*Withdrawn*)

0393-94-M: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Honey Electric Limited (Respondent) (*Withdrawn*)

0418-94-M: Communications, Energy and Paperworkers Union of Canada (Applicant) v. Intercon Security Limited (Respondent) (*Granted*)

0457-94-M: United Food and Commercial Workers International Union, Locals 175 and 633 (Applicant) v. Cuoco Food Services Ltd. (Respondent) (*Withdrawn*)

0585-94-M: CUPE Local 3181 (Applicant) v. Incorporated Synod of The Diocese of Ottawa (Respondent) (*Withdrawn*)

APPLICATIONS FOR CONSENT TO PROSECUTE

3466-93-U: York Unit of the Ontario English Catholic Teachers Association (Applicant) v. The York Region Roman Catholic Separate School Board (Respondent) (*Withdrawn*)

JURISDICTIONAL DISPUTES

3603-93-JD: Ontario Sheet Metal Workers' & Roofers' Conference Sheet Metal Workers' International Association, Local 397 (Applicant) v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 508, E. S. Fox Limited (Respondents) (*Granted*)

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

0217-94-M: Ontario Public Service Employees' Union (Applicant) v. Family Focus/Leeds & Grenville (Respondent) (*Dismissed*)

0532-94-M: Toronto East General & Orthopaedic Hospital Inc. (Applicant) v. Service Employees International Union, Local 204 and The Association of Allied Health Professionals: Ontario (Respondents) (*Dismissed*)

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

3133-93-OH: Mrs. Chai Chu Thompson (Applicant) v. St. Joseph's Hospital, Hamilton (Respondent) (*Dismissed*)

3496-93-OH; 3769-93-OH: Brian Hack (Applicant) v. Carlton Cards Limited (Respondent) v. Communications, Energy and Paperworkers Union and its Local 322 (Intervener); Brian Hack (Applicant) v. Carlton Cards Limited (Respondent) (*Withdrawn*)

4053-93-OH: Mr. Paul Lane, Correctional Officer (Applicant) v. Ms. Julie Lockwood, Coordinator of Employee Health Services, As Agent for the Crown in the Right of Ontario, Ministry of the Solicitor General, Correctional Services (Respondent) (*Withdrawn*)

4296-93-OH: John J. Crosby II (Applicant) v. K Mart Canada Limited (Respondent) (*Withdrawn*)

4305-93-OH: Mark Desipio (Applicant) v. Precision Engineering Company division of PECO Tool and Die Ltd. (Respondent) (*Dismissed*)

0255-94-OH: The Canadian Union of Public Employees and its Local 1600 (Applicant) v. The Board of Management Metropolitan Toronto Zoo (Respondent) (*Withdrawn*)

0367-94-OH: Wayne Floren and Metropolitan Toronto Civic Employees' Union, Local 43 (Applicant) v. The Municipality of Metropolitan Toronto, Walter Jova and Carl MacIntyre (Respondent) (*Withdrawn*)

0494-94-OH; 0495-94-OH; 0496-94-OH; 0497-94-OH; 0498-94-OH; 0499-94-OH: Bill (William) C.X Strang (Applicant) v. M.K.A. Plastics (Respondent); Steve Lottridge (Applicant) v. M.K.A. Plastics (Respondent); Joe R. Ormond (Applicant) v. John Rocchi [M.K.A. Plastics] (Respondent); Derek Guagliano (Applicant) v. MKA Plastics (Respondent); Shawn Merritt (Applicant) v. MKA Plastics (Respondent); Mike McGrath (Applicant) v. MKA Plastics (Respondent) (*Withdrawn*)

CONSTRUCTION INDUSTRY GRIEVANCES

2616-92-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Eli's Electric Service, Town and Country Electric Ltd., E & E Steeles Electric Ltd. c.o.b. as E & E Steeles Electric and Steeles Electric (Respondents) (*Granted*)

2880-92-G: United Brotherhood of Carpenters and Joiners of America, Local 446 (Applicant) v. Nicholls Radtke Limited (Respondent) v. Labourers' International Union of North America, Local 1036 (Intervener) (*Withdrawn*)

0686-93-G; 3747-93-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Corporation of the City of Toronto (Respondent) (*Withdrawn*)

2837-93-G; 3010-93-G; 3062-93-G; 0263-94-G; 0264-94-G: Drywall Acoustic Lathing and Insulation, Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Belmont Plastering (Respondent); Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Belmont Drywall & Acoustics Ltd. (Respondent) (*Endorsed Settlement*)

3156-93-G; 3436-93-G: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Pelbro Drywall Co. Ltd., Lorden Contracting Inc. (Respondents); United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. 836200 Ontario Inc. and Lorden Contracting Inc. (Respondents) (*Endorsed Settlement*)

3883-93-G; 3884-93-G; 3902-93-G; 3978-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Rochefort Construction (1982) Limited, Des-Build Development Ltd., Niroc Construction Ltd. (Respondents); Labourers' International Union of North America, Local 493 (Applicant) v.

Des'Build Development Ltd. and Rochefort Construction Limited and Rochefort Construction (1982) Limited and Niroc Construction Ltd. (Respondents) (*Withdrawn*)

4005-93-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. K2 Contracting Inc., Enersave Lighting Ottawa, Kantec Electric Inc. (Respondents) (*Withdrawn*)

4208-93-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Unions 628 and 254 (Applicant) v. Premier Murphy-A Joint Venture (Respondent) (*Withdrawn*)

4340-93-G: United Brotherhood of Carpenters and Joiners of America, Local 2041 (Applicant) v. Cambareri Construction Inc. and Rocco Cambareri (Respondents) (*Endorsed Settlement*)

0100-94-G: International Association of Bridge, Structural & Ornamental Iron Workers, Local 721 (Applicant) v. Milvan Iron Works Ltd. (Respondent) (*Granted*)

0101-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Locals 759 and 786 (Applicant) v. Northern Reinforcing Products Ltd. (Respondent) (*Granted*)

0102-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Visentin Steel Fabricators Ltd. (Respondent) (*Granted*)

0104-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. D.K.W. Schwarz Steel Construction Ind. and Red Iron (Respondent) (*Endorsed Settlement*)

0128-94-G: International Brotherhood of Electrical Workers Local Union 353 (Applicant) v. Simple X Electric (1987) Inc. (Respondent) (*Endorsed Settlement*)

0140-94-G: Labourers' International Union of North America, Local 837 (Applicant) v. T. F. Forming Inc. (Respondent) (*Endorsed Settlement*)

0142-94-G: Sheet Metal Workers' International Association Local Union No. 285 (Applicant) v. Centair Mechanical Company (Respondent) (*Endorsed Settlement*)

0215-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. DiMarco Plumbing & Heating Co. Ltd. (Respondent) (*Granted*)

0241-94-G: International Brotherhood of Painters and Allied Trades Local 1819 (Applicant) v. M & I Aluminum Ltd. (Respondent) (*Endorsed Settlement*)

0245-94-G: International Union of Operating Engineers and its Local 793 (Applicant) v. Blue-Con Construction Inc. (Respondent) (*Withdrawn*)

0269-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. R. L. General Carpentry (Respondent) (*Withdrawn*)

0271-94-G: The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Par Mechanical (Respondent) (*Endorsed Settlement*)

0276-94-G; 0277-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Imota Enterprises Ltd. (Respondent) (*Granted*)

0278-94-G: International Association of Bridge, Structural and Ornamental Iron Workers, Local 721 (Applicant) v. Mac Reinforcing Ltd. and 860716 Ontario Limited (Respondents) (*Endorsed Settlement*)

0283-94-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Calorific Construction Limited (Respondent) (*Endorsed Settlement*)

0295-94-G: Labourers' International Union of North America, Local 183 (Applicant) v. Bairrada Masonry Inc. (Respondent) (*Withdrawn*)

0308-94-G: Carpenters and Allied Workers Local 27 United Brotherhood of Carpenters and Joiners of America (Applicant) v. CTV Flooring Co. Inc. (Respondent) (*Granted*)

0309-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. Condor Crane Service Inc. (Respondent) (*Endorsed Settlement*)

0310-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. Tri-Krete Limited (Respondent) (*Withdrawn*)

0340-94-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Withdrawn*)

0341-94-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Granted*)

0342-94-G; 0343-94-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Amberland Electric Inc. (Respondent) (*Withdrawn*)

0364-94-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. Gatto Painting (Respondent) (*Withdrawn*)

0366-94-G: The International Brotherhood of Painters and Allied Trades and the Ontario Council of the International Brotherhood of Painters and Allied Trades (Applicant) v. Supreme Decorating & Painting (Respondent) (*Endorsed Settlement*)

0372-94-G; 0373-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Ziggy's General Contracting (Respondent) (*Endorsed Settlement*)

0374-94-G; 0375-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Ducan Ceiling Limited (Respondent) (*Withdrawn*)

0376-94-G; 0377-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Strap Drywall & Acoustics Systems Ltd. (Respondent) (*Endorsed Settlement*)

0378-94-G; 0379-94-G: Drywall Acoustic Lathing and Insulation Local 675 (Applicant) v. Majestic Interiors Systems & Demo (Respondent) (*Endorsed Settlement*)

0380-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 463 (Applicant) v. Zentil Plumbing & Heating Contracting Ltd. (Respondent) (*Endorsed Settlement*)

0383-94-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Pickard Construction (1991) (Respondent) (*Withdrawn*)

0397-94-G: International Union of Operating Engineers, Local 793 (Applicant) v. D. Lafreniere Builders Ltd. (Respondent) (*Endorsed Settlement*)

0478-94-G: International Union of Bricklayers and Allied Craftsmen, Local 31, Ontario (Applicant) v. Step on Class Flooring (Respondent) (*Endorsed Settlement*)

0491-94-G: International Union of Operating Engineers and its Local 793 (Applicant) v. Elirpa Construction and Materials Limited (Respondent) (*Withdrawn*)

0492-94-G: Labourers' International Union of North America, Local 506 (Applicant) v. E & M Precast Limited (Respondent) (*Withdrawn*)

0526-94-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Dielco Industrial Contractors Ltd. (Respondent) (*Endorsed Settlement*)

0527-94-G: International Association of Heat and Frost Insulators and Asbestos Workers, Local 95 (Applicant) v. Falric Insulation Ltd. (Respondent) (*Withdrawn*)

0552-94-G: International Association of Bridge, Structural and Ornamental Ironworkers, Local 700 (Applicant) v. Dor-Co Sales & Service Ltd. (Respondent) (*Endorsed Settlement*)

0553-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 527 (Applicant) v. Groff & Associates Ltd. (Respondent) (*Endorsed Settlement*)

0555-94-G: Millwrights and Machine Erectors Local 2309, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 879097 Ontario Inc. c.o.b. Advance Installations (Respondent) (*Endorsed Settlement*)

0577-94-G: United Brotherhood of Carpenters and Joiners of America, Local 93 (Applicant) v. Construction G. Di Iorio Inc. (Respondent) (*Withdrawn*)

0594-94-G: International Brotherhood of Painters and Allied Trades, Locals 1891 and 1494 (Applicant) v. Trojan Interior Contracting Limited (Respondent) (*Withdrawn*)

0597-94-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 46 (Applicant) v. In-Line Process Fabrication Ltd. (Respondent) (*Endorsed Settlement*)

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

1191-89-U: Antoine A. Plennevaux (Applicant) v. Labourers International Union of North America, Local 1036 (Respondent) (*Dismissed*)

0412-91-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. McCarthy Milling Limited (Respondent) v. Adm-Agri Industries Limited (Intervener) (*Denied*)

3215-91-U; 2091-92-OH: Ivan Gudelj (Applicant) v. "GMP" - Glass, Molders, Pottery, Plastics & Allied Workers International Union AFL-CIO-CLC Local 64, Canron Inc. (Respondents); Ivan Gudelj (Applicant) v. Canron Inc. (Respondent) (*Denied*)

2510-92-M: Ontario Public Service Employees Union Local 238 (Applicant) v. Conestoga College of Applied Arts and Technology (Respondent) (*Denied*)

3400-92-U: Anwar Chaudri (Applicant) v. Canadian Union of Public Employees/Ontario Hydro Employees' Union, Local 1000 (Respondent) v. Ontario Hydro (Intervener) (*Denied*)

2078-93-R: United Brotherhood of Carpenters and Joiners of America, Drywall Acoustic Lathing and Insulation, Local 675 (Applicant) v. Imota Enterprises Ltd. (Respondent) (*Denied*)

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